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January 1, 1996

**MEMORANDUM TO:** Annotation Users

**FROM:** Frank White  
Manager  
Corporate Freedom of Information and  
Privacy Office  
Management Board Secretariat

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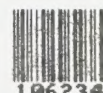
Enclosed please find the January 1996 revised edition of the Annotation. Since this edition comprises all of the material in the previous editions, you may discard those Annotations and replace them with this one. The Annotation is fully updated to include summaries of the Orders and significant Privacy Investigation Reports made by Ontario's Information and Privacy Commission from January 1988. Also included are summaries of relevant court decisions. Like the 1995 edition, the Annotation is provided in a three-hole punch format so that it may be easily inserted in a binder. You may wish to use numbered tabs to separate the sections of the legislation. The Annotation is colour coded; the legislation is reproduced on yellow pages and the summaries of the decisions are on white pages.

A Concordance of Section Numbers for both Acts and a Subject Index for both Acts, located in the front of the Annotation, will assist the reader to find the sections and corresponding Annotation summaries.

Located at the back of the Annotation is an Index of Annotated Orders and Investigation Reports. This Index contains an alphabetical subject listing, which references the summaries of decisions and relevant section numbers contained in the Annotation.

If you require further copies of the Annotation, please contact the Ontario Government Bookstore at (416) 326-5320. If you have any comments on the format or contents of this publication, please contact Howard Jones, Policy Advisor to the Corporate Freedom of Information and Privacy Office, at (416) 327-2192.

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# **ONTARIO'S ACCESS AND PRIVACY LEGISLATION**



## **AN ANNOTATION**

January 1996



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**THE FREEDOM OF  
INFORMATION AND  
PROTECTION OF PRIVACY ACT**

**R.S.O. 1990, Ch.F.31 and  
Ontario Regulations 459  
and 460**

**THE MUNICIPAL FREEDOM OF  
INFORMATION AND  
PROTECTION OF PRIVACY ACT**

**R.S.O. 1990, Ch.M.56 and  
Ontario Regulation 823**



# **ONTARIO'S ACCESS AND PRIVACY LEGISLATION -- AN ANNOTATION**

**January 1, 1996**

THIS FIFTH EDITION OF THE ANNOTATION IS PUBLISHED TO ASSIST IN INTERPRETING THE PROVINCIAL AND MUNICIPAL FREEDOM OF INFORMATION AND PRIVACY LEGISLATION IN ONTARIO. THE ANNOTATION IS PREPARED BY THE CORPORATE FREEDOM OF INFORMATION AND PRIVACY OFFICE OF MANAGEMENT BOARD SECRETARIAT.

This fully updated fifth edition of the Annotation contains all of the Corporate Freedom of Information and Privacy Office's highlights of the Information and Privacy Commissioner's Orders made under the:

- **Freedom of Information and Protection of Privacy Act (FIPPA), and**
- **Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).**

These summaries represent points made by the Information and Privacy Commissioner\Ontario in Orders **#1 to P-1041 and #M-1 to M-637** inclusive. Also included are summaries of relevant court decisions and significant Privacy Investigation Reports issued by the Information and Privacy Commissioner\Ontario.

The summaries and comments contained in the Annotation represent the Corporate Freedom of Information and Privacy Office's interpretation of the Orders and Privacy Investigation Reports made by the Information and Privacy Commissioner\Ontario and of the decisions made by courts. Where greater clarity is needed, reference should be made to the original Order, report or decision.

Further copies of the Annotation may be obtained through the Ontario Government Bookstore.

**QUESTIONS OR COMMENTS REGARDING THE ANNOTATION SHOULD BE DIRECTED TO:**

**ANNOTATION  
MANAGEMENT BOARD SECRETARIAT  
CORPORATE FREEDOM OF INFORMATION AND PRIVACY OFFICE  
101 BLOOR STREET WEST, SUITE 802,  
TORONTO, ONTARIO  
M5S 1P7**



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1. Concordance of Section Numbers for Both Acts
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4. FIPPA / MFIPPA Amalgamated Regulations
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### **HOW THE ANNOTATION IS ORGANIZED**

The organization of the Annotation is based on three colours. The yellow pages contain the legislation sections that are numbered consecutively. The white pages contain the Annotation summaries. The Annotation summaries are located under the section number to which they refer. The Annotation summaries have the page number and section reference at the bottom of each page. The green pages contain the three indices.







## CONCORDANCE OF SECTION NUMBERS FOR BOTH ACTS

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**NOTE:** The references to the section numbers denote FIPPA sections on the left and MFIPPA sections on the right.

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**FIPPA / MFIPPA**

**AMALGAMATED STATUTES**







# FIPPA

s.1

## PURPOSE

# MFIPPA

s.1

The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
  - (i) information should be available to the public,
  - (ii) necessary exemptions from the right of access should be limited and specific, and
  - (iii) decisions on the disclosure of government information should be reviewed independently of government; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.







(1) In this Act,

"head", in respect of an institution, means,

(a) in the case of a ministry, the minister of the Crown who presides over the ministry, and

(b) in the case of any other institution, the person designated as head of that institution in the regulations; ("personne responsable")

"head", in respect of an institution, means the individual or body determined to be head under section 3; ("personne responsable")

"Information and Privacy Commissioner" and "Commissioner" mean the Commissioner

appointed under subsection 4(1);

appointed under subsection 4(1) of the Freedom of Information and Protection of Privacy Act;

("commissaire à l'information et à la protection de la vie privée", "commissaire")



"institution" means,

- (a) a ministry of the Government of Ontario,

- (b) any agency, board, commission, corporation or other body designated as an institution in the regulations;  
("institution")

"law enforcement" means,

- (a) policing,

- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

- (c) the conduct of proceedings referred to in clause (b);  
("exécution de la loi")

"institution" means,

- (a) a municipal corporation, including a metropolitan, district or regional municipality or the County of Oxford,

- (b) a school board, public utilities commission, hydro-electric commission, transit commission, suburban roads commission, public library board, board of health, police commission, conservation authority, district welfare administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the Municipal Act,

- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations;  
("institution")

"Minister" means the Chairman of the Management Board of Cabinet;  
("ministre")



"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where(FIPPA)/if(MFIPPA) it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("renseignements personnels")

"personal information bank" means a collection of personal information that is organized and capable of being retrieved using an individual's name or an identifying number or particular assigned to the individual; ("banque de renseignements personnels")

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and



- (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

"regulations" means the regulations made under this Act; ("règlements")

"responsible minister" means the minister of the Crown who is designated by order of the Lieutenant Governor in Council under section 3. ("ministre responsable")

#### PERSONAL INFORMATION

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

#### BODIES CONSIDERED PART OF MUNICIPAL CORPORATION

No comparable section

(3) Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated under clause (c) of the definition of "institution" in subsection (1) is deemed to be a part of the municipal corporation for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipal corporation.



**"INSTITUTION"**

- The Mining and Lands Commissioner was not designated as an institution by regulation and was not a ministry or part of the Ministry of Natural Resources. As a result, it was not an "institution" under the Act and its records were not accessible under the Act. The Information and Privacy Commission considered that the Mining and Lands Commissioner was independent of the Ministry of Natural Resources and exercised independent administrative and quasi-judicial functions. Appeals of its decisions were made to the courts and not to the Minister of Natural Resources. (The Mining and Lands Commissioner was subsequently covered under the Act by regulation.) (**Order #P-231**)
- The Courts in Ontario are not designated as an institution under Regulation 460 nor are the courts included in paragraph (a) of the definition of "institution" nor do they form part of any ministry of the Ontario government for the purposes of the Act. (**Order #P-994**)

**"LAW ENFORCEMENT"****Part (a) and (b)**

- A report to the Deputy Ontario Provincial Police Commissioner concerning an investigation into the Criminal Code and the Narcotic Control Act concerns "policing" under part "a" of the definition and also meets the definition of law enforcement under part "b". (**Order # P-932**)
- The Commission ruled that an investigation into an allegation of workplace harassment undertaken by an institution is not a law enforcement investigation. (**Order #P-962**)

**Part (b)--Law Enforcement Investigations and Inspections**The Following are Law Enforcement Activities:

- The Support Custody Orders Enforcement Branch that initiates legal proceedings or takes various steps to enforce custody and support awards (**Privacy Investigation Report #I90-72**);
- Enforcement records maintained by the Family Support Plan Branch (**Order #P-589**);
- A writ of seizure and sale proceeding (**Privacy Investigation Report #I90-72**);
- A complaint to the Workers' Compensation Board that an injured worker is in fact able to work, and therefore not entitled to compensation (**Privacy Investigation Report #I89-59**);



- Investigations by the Human Rights Commission into complaints under the Ontario Human Rights Code (**Orders #89, 178, 200, 208, P-221, P-242, P-253, P-258, P-322, P-330, P-363, P-403, P-449, P-466, P-492, P-507, P-616, P-973, P-981**)
- Investigations in respect of enforcement of the Employment Standards Act (**Order #94**);
- Investigations in respect of the enforcement of the Apprenticeship and Tradesmen's Qualifications Act (**Orders #136, 137**);
- The investigation of an Eligibility Review Officer regarding the requester's right to certain social welfare benefits could lead to a sanction such as an assessment of overpayment or the withholding of benefits. (**Order #139, Privacy Investigation Report #I90-04, P-963, P-967, P-969**)
- A city's property standards and by-law enforcement processes (**Orders #M-4, M-10, M-34, M-181, M-244, M-560, M-575, M-582, M-513**)
- An investigation in respect of a possible offence under the Liquor Licence Act (**Order #P-338**);
- The Ontario Police Commission is a "tribunal" as referred to in the definition of "law enforcement." Internal disciplinary investigations into "offences" listed by regulation under the Police Services Act may be punished by demotion or dismissal and therefore are law enforcement proceedings. The police officer may on "conviction" appeal to the Ontario Police Commission. While generally "law enforcement" does not include employment-related disciplinary matters, in these cases the investigations were undertaken to determine whether the actions constituted an offence against discipline. These matters are therefore "law enforcement." (**Orders #P-285, P-372, P-482, M-223, P-626, M-366, M-422**);
- Records regarding the activities of the Ontario Provincial Police Tactical Response Unit (TRU Team) in respect of the investigation of a motor vehicle accident were "law enforcement" records. Members of the team were charged with Neglect of Duty under the Code of Offences contained in Regulation 927 of the Police Services Act. Under s.61 of the Act a penalty or sanction, including dismissal, demotion or suspension may be imposed if the officers are found "guilty" as "charged." Appeals of the penalty imposed on a member may be made to the Ontario Police Commission under s.65 of the Police Services Act. (**Orders #P-482, M-366**);
- Investigations under the Insurance Act are law enforcement proceedings. The Superintendent of Insurance has the powers of a tribunal, which may impose a penalty or sanction. (**Orders #P-302, P-304, P-452**);
- Investigations or inspections under the Ontario Drug Benefit Act and the Prescription Drug Cost Regulation Act lead or could lead to proceedings in a court or tribunal where a



penalty or sanction could be imposed. (**Order #P-324**);

- The Ministry of Consumer and Commercial Relations conducts investigations into alleged breaches of the Bailiffs Act. These investigations may lead to prosecutions for offences. (**Order #P-478**);
- The Ontario Securities Commission (OSC) engages in "law enforcement." Its investigations could lead to proceedings before the OSC or the courts where penalties may be imposed under the Securities Act. (**Orders #30, P-452, P-548, P-583, P-677**);
- Investigations conducted by the Pension Commission of Ontario under s.106 of the Pension Benefits Act (PBA) are law enforcement investigations. The Superintendent of Pensions has broad investigatory and enforcement powers in this regard and breaches of the Pension Benefits Act, its regulations or orders are offences that could lead to proceedings in a court where penalties could be imposed. (**Orders #P-542, P-543**);
- Part VIII of the Environmental Protection Act deals with sewage systems and contains an offence section. Under s.77(6) the director has the authority to revoke a certificate of approval, which results in the nullification of the use permit. Section 78 prohibits the use of a sewage system without a use permit. Breaches of Part VIII of the Act, its regulations, orders or failure to comply with any term or condition of a certificate of approval constitutes an offence under s.83 of the Act. (**Order #M-268**);
- The Public Complaints Commission has the statutory authority to call a Board of Inquiry to adjudicate on the substance of allegations of police misconduct. The Board of Inquiry is empowered under the Police Services Act to impose penalties or sanctions on officers found to have engaged in unlawful conduct. (**Order #P-659**);
- Investigations conducted by the Ministry of Consumer and Commercial Relations regarding contraventions under the Real Estate and Business Brokers Act are law enforcement investigations. Individuals who are refused registration may appeal to the Commercial Registration Appeal Tribunal. Failure to abide by a decision of the Registrar of Real Estate and Business Brokers is an offence. (**Order #P-701**);
- Inspections and investigations under the Ontario Building Code Act and the Ontario Building Code (**Order #M-364**).
- Investigations or inspections under the Collection Agencies Act which could lead to proceedings before a court or tribunal, the Commercial Registration Appeal Tribunal, are law enforcement activities. (**Order #P-952**)

The Following are not Law Enforcement Activities:

- A forensic investigation which was carried out at the request of the City with the results relayed back to the City and not to the police or other law enforcement authorities was not



law enforcement. (Order #M-521)

- While police cellular telephone bills in their complete unsevered form contain information which relates to law enforcement within the meaning of this section, the account and invoice numbers alone do not relate to the law enforcement activities of the police. (Order #M-552)

## **Internal Investigations**

### Criteria for Internal Investigations to be Within the Definition of Law Enforcement

- In order for an internal employment-related disciplinary investigation to qualify as a "law enforcement" activity under the Act, an institution must establish that: (a) the investigation involves unlawful conduct, in the sense that the conduct may constitute a violation of a statute or regulation; and (b) the investigation was conducted with a view to proceedings in a court or tribunal in which a penalty or sanction could be imposed. Records created as a result of an investigation conducted by the Professional Standards Branch of a Board of Commissioners of Police, and not the Ontario Civilian Commission on Police Services, are not exempt under this provision. The Professional Standards Branch is a body responsible for reviewing internal employment-related disciplinary matters, and is not a regulatory or law enforcement agency involved in "law enforcement" activities as the term is used in the Act. The record at issue was created as a result of an investigation that was conducted by the police in their role as an employer, not as a regulatory or law enforcement agency. This was so even though the report was the basis for an investigation conducted by the Ontario Civilian Commission on Police Services. (Order #M-98)

### Internal Investigations Not Within the Definition of Law Enforcement

- The definition of "law enforcement" is not broad enough to include an internal investigation conducted by an institution to decide whether disciplinary action should be taken against an employee. This is so even where grievance proceedings may result. Where the investigation is conducted by the institution as employer and not as regulator, the investigation is not law enforcement. Law enforcement investigations or inspections must involve conduct that is a breach of a statute or regulation. Even where this is the case, the institution must have the intention to pursue the matter through the police or another law enforcement agency or with a view to proceedings before a court or tribunal. Internal investigations for breach of contract or conflict of interest are not offences and are not therefore included. (Orders #157, 98, 165, 170, 182, 192, M-46, P-399, M-98, M-258, M-315, P-936)
- Records do not fall within the definition of "law enforcement" where they are created by the institution's personnel in their capacity as human resources and staff relations specialists conducting an investigation concerning sexual harassment, nor are the investigations carried out on behalf of the Ontario Human Rights Commission. (Order



- Internal investigations for fraud that merely involved or interested the police are not transformed into "law enforcement" investigations because of the police involvement. In this case, the investigation was referable to invoices submitted by an employee for services rendered in his or her professional capacity. The investigation was fundamentally to determine whether the employee ought to be disciplined. (**Order #M-258**)
- An investigation conducted by a college that resulted in a notice of trespass being served on a student is not "law enforcement." The investigation was conducted to determine whether to revoke the student's registration and bar his entry to the school. (**Order #P-377**)
- Complaints about the conduct of Ministry of Correctional Services staff do not relate to the ministry's law enforcement responsibilities under the Ministry of Correctional Services Act. The ministry indicated that if the allegations of misconduct had been substantiated, the police would have been involved prior to the laying of any criminal charges. In this case, the police were not called and the investigation is properly characterized as an internal investigation that was not conducted by the institution as enforcer or regulator. The records are therefore not characterized as "law enforcement." (**Order #P-399**)
- Where an institution is conducting an internal investigation, and not one that relates to its external regulatory activity, the records are not characterized as "law enforcement." The institution is not in the position to enforce any offence following the investigation. (**Re Solicitor General of Ontario et al. v. Assistant Information and Privacy Commissioner et al., (1993), 102 D.L.R. (4th) 602 (Ont. Div. Ct.)**)
- Where a record was prepared in the course of a supervisor's internal investigation into the conduct of an officer of the court, it was not an investigation that carried with it the possibility of a "law enforcement" proceeding. (**Order #P-392**)
- An internal investigation of a teacher by a Board of Education was for the purpose of disciplining the individual and not for a law enforcement purpose. Neither the police nor the Children's Aid Society had investigated the matter or received records in this regard. (**Order #M-328**)

## "PERSONAL INFORMATION"

(see also ss.2(2), which states that "personal information" does not include information about an individual dead for more than 30 years.)

## GENERAL

The List of Examples is Not Exhaustive



- Because the word "including" is used in the definition of "personal information," the list of examples is not exhaustive. "Personal information" may also include matters not reflected in clauses 2(1)(a) to (h) of the definition. (**Orders #11, 97, M-539**)
- A note to a Crown attorney containing the names of those accused and Crown witnesses is "personal information." (**Order #39**)
- Names of lottery winners are "personal information." (**Orders #180, 181**)
- A list of named employees of an institution who were assaulted in the course of their duties contains personal information. (**Order #M-121**)
- The name, occupation, business telephone number, gender, race, height, weight, hair colour and condition of a witness who was interviewed regarding an investigation into a criminal offence is "personal information" of the witness. Information provided by the witness is the personal information of the witness, the affected person and the complainant. (**Order #M-84**)
- Reliance on the definition of personal information to include deceased persons (unless they have been deceased longer than 30 years) is not contingent on whether or not the deceased person has a personal representative appointed. The Commission found that to suggest that a deceased person must be represented by a personal representative would be an uneven and unfair application of the Act's privacy protection provisions regarding deceased persons, favouring those whose circumstances warrant the appointment of a personal representative. (**Order #P-945**)

### **"Recorded Information"**

- Oral comments that have not been recorded do not come within the definition of "personal information and cannot be accessed by a request under the Act." (**Orders #17, 19, 99, 196, M-33, Privacy Investigation Reports #I92-16M, I90-23, I91-19P, I91-81P**)
- Personal information includes videotape records or photographs of an individual. (**Privacy Investigation Reports #I92-39M, I93-026P**)

### **"Individual"**

- The reference to "individual" in the definition of "personal information" is a reference to a natural person, i.e., not to a corporation, partnership, sole proprietorship or trade union. (**Orders #16, 53, 113, P-394, M-224, P-677, M-340, M-430**)



- Buildings may be owned by individuals or business entities. Where the owner or builder is an individual, the name and address qualify as personal information; where the owner or builder is a business entity, the names and business addresses are not personal information. **(Order #M-138)**
- The name of residential care facilities, their addresses and phone numbers do not contain "personal information." The fact that disclosure of the type of facility, as being either a children's or young offender residence, could enable an individual to discern personal information about the residents does not mean that the information being disclosed is "personal information" under the Act. This information relates solely to a service provided by a business entity and does not contain "personal information." **(Order #M-195)**

### **About an "Identifiable" Individual**

- If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies as "personal information" under the definition. Therefore, even where the name, address and telephone number is removed from letters sent by an individual to oppose the leasing of a particular plot of land, the remaining information could reasonably identify an individual. **(Orders #P-230, P-401, P-774, M-438, M-570, M-585, P-952, P-975)**
- Current salary information alone, without information respecting identity, does not fall within the definition of "personal information"; however, where only one individual holds a position and there is a record of that person's salary, that record is "personal information" because it is recorded information about an identifiable individual. **(Orders #61, M-5)**
- Where an institution alleges that the disclosure of certain revenues and expenditures in a budget contains personal information, it must provide verification of this. In this case the amount paid for salaries was anonymized. The institution stated that individuals who were knowledgeable about the salaries could discern which salary was paid to whom. In the absence of verification, the Commission found that the allegation was speculative and ruled that the information was not "personal information." **(Order #P-488)**
- Health card version codes that appear on health cards and which identify whether or not the health card is a replacement card must be considered in light of the unique health insurance number which is a unique identifier. Consequently, the version code number is "personal information." **(The Queen in Right of Ontario as represented by the Ministry of Health v. Anita Fineberg, Inquiry Officer, et al., June 24, 1994, Ontario Divisional Court, overturning Order #P-590)**
- Employees' names and any other information pertaining to them as contacts or witnesses in the context of an internal investigation is their personal information. **(Order #M-521)**



- A record may contain personal information where individuals are not mentioned by name if they are readily identifiable by individuals who are familiar with the circumstances surrounding the creation of the records. (**Orders #M-287, M-378**) For example, a report concerning the internal investigation of a workplace harassment allegation contained the personal information of the witnesses even though they were identified by number only, because they were readily identifiable by those who were familiar with the circumstances of the investigation. (**Order #P-651, P-903**)
- The number of overtime hours paid and banked in respect of a certain program was held to be "personal information." The Commission noted that the information was, as it turned out, only referable to one individual and that there would be a reasonable expectation that the information could be linked with that individual. (**Order #M-438**)
- Even though individuals may not be mentioned by name in a operational review of an institution, the description of job categories and responsibilities was sufficiently detailed to allow for the drawing of accurate inferences of the identities of individuals. Because this information served as the personal identifier, it met the definition of personal information. (**Order #M-480**)
- Any information which relates directly or indirectly to an individual or a matter which involves the individual could be considered personal information for the purposes of a request and for determining fees. Thus where the police were asked for all information related to a charge laid against an individual, all the information kept in this regard is the individual's personal information even where some of the pages only indirectly relate to the individual or his or her matter. (**Order #M-514**)
- References to an individual made solely for the purpose of relating the record to a relevant file, nonetheless connected him to an investigation into his activities and therefore constituted his personal information. (**Order #M-521**)
- In this case an unsigned letter sent to a named City Councillor was held to be personal information. The subject matter of the letter was such that the Commission held that the identity of the writer could be determined. (**Order #M-570**)

#### Job Competition Records

- If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies as "personal information." Even by deleting the names of two successful candidates in a job competition, the disclosure of the scores would be tantamount to disclosing their names. The ability to identify which score belongs to which person is significant. As such this information is personal information. (**Orders #P-469, P-230, M-232, P-722, P-924, P-932, P-940**)
- Even where resumes are severed, the remaining information dealing with work skills,



education levels and related data may be personal information because it may identify an individual. As a result, severing resumes must be very extensive to anonymize personal information. (**Orders #P-328, 159**)

- Ratings, notes and test results created during a job competition are the "personal information" of the competitors where disclosure would identify the individuals. (**Orders #20, 43, 97, 196, M-280**)
- In this case, the Commission found that severing the names from the pre-screening sheets of the panel members, where there were 16 candidates, was sufficient to anonymize the information. Thus, the names of the interviewers, the questions asked and the candidates' scores were disclosed. The actual responses made by the candidates were not disclosed because many of them could serve to identify the candidates. (**Order #P-733**)
- 127 job applications and resumes could not be adequately anonymized even if the names and personal identifiers were removed. (**Order #P-975**)

#### **Information That is Not About an "Identifiable" Individual**

- Records that refer to "girls" and "staff" at a training school and indicate that certain unnamed individuals were investigated for incidents not specifically identified do not contain personal information. (**Order #P-316**)
- Records that disclose anonymized test results relating to a particular course of study in a particular school do not disclose personal information. The fact that the efficiency of the school principal or of a teacher may be discerned does not make the information "personal information" as defined. (**Order #M-27**)
- An occurrence number assigned to a police investigation file is not personal information. (**Order #M-41**)
- Terms relating to employees generally (without identifying individual employees) in a service contract between an institution and a services company do not fall within the definition of personal information. (**Order #M-231**)
- The total increased costs of increased employee benefits for all workers of an institution (in this case there were seven employees) did not constitute "personal information." As well, the percentage salary increase allocated to each of the positions was not "personal information." The increase to the salaries was not related to merit or performance; rather, the salary adjustments were made to the positions based on the results of a survey. The Commission was not persuaded that the actual salaries of individuals could be determined from the information disclosed. (**Order #M-414**)
- The date, location and general description of an incident where the fire department was dispatched is not personal information (**Order #M-548**)



- The information relates to the number of children who were seen in a public location and for whom the appellant was providing care. It is the Commission's opinion, these facts could well be within the knowledge of any number of individuals. There is no reasonable expectation that the complainant can be identified by the appellant from this information. Accordingly, the information does not satisfy the requirements of the definition of personal information. **(Order #P-953)**
- The Commission ruled that while there was a reasonable expectation that the identity of the author of the hand written note of a complaint could be determined, the institution's typed version of the note was anonymous. **(Order #M-585)**

### **"Information" About an Identifiable Individual**

- Information in a record stating the type of pension plan applicable to a specific individual (e.g., a defined benefit plan) is "personal information." **(Privacy Investigation Report #I91-52P)**
- The names and addresses of individual landowners of designated Areas of Natural and Scientific Interest are "personal information." **(Order #P-559)**
- Simply because a creditor has an interest in documents about the collapse of a mortgage brokerage business, the information does not become the personal information of the creditor. An interest in the subject matter and possible outcome of events which led to the creation of the document is not sufficient, on its own, to bring the contents of the record within the definition of "personal information." **(Order #P-502)**
- The disclosure of the names of supply teachers who worked at a particular school over a particular period of time was "personal information" because it would reveal other personal information about the named individuals. **(Order #M-292)**
- In this case, a wife requested information regarding a bylaw complaint made against property she and her husband owned. The only personal information in the requested record concerned information about the requester's husband. Because the husband had confirmed with the Commission that the request was submitted by his wife on her behalf as well as his behalf, this provision did not apply. **(Order #M-585)**

### **Records by or About Individuals Acting in Their Official Capacity**

#### In General, This Information is Not Personal Information

- Where individuals are named in their professional or official capacity, the names are not personal information. The professional addresses and titles of these individuals are also not "personal information." For example, where employees draft reports on behalf of their employer or write letters on company letterhead, their identity is not personal information.



As well, the names of individuals who write letters on behalf of an association or group are not "personal information." (**Orders #78, 80, 113, 139, 157, P-257, P-270, P-300, P-326, P-328, P-329, P-333, P-369, P-377, M-25, M-36, M-47, M-57, M-71, M-74, M-79, M-106, M-107, M-108, M-113, M-114, M-115, P-441, M-118, Privacy Investigation Reports #I92-46P, I91-72P, M-127, M-128, P-454, P-463, P-470, P-473, P-477, P-478, P-480, P-492, P-510, P-518, P-532, M-198, M-195, M-102, P-604, M-230, M-233, P-576, P-578, M-249, M-258, M-260, M-262, P-631, P-635, P-643, P-660, P-654, M-290, P-658, P-677, P-715, M-340, M-375, P-746, M-394, P-773, P-787, P-788, M-409, M-412, P-421, M-569, P-926, P-936, P-964, )**

- The payment or non-payment of a fee to members of a council is not determinative of whether information contained in records of the council is "personal information." Since the work of the council is to carry out the business of government, the minutes of meetings of the council ought not to be considered the personal information of the members who were so recorded. The minutes reflect the direction in which the meetings proceeded to conduct council business. The in camera nature of one of the meetings does not alter the characterization of the information related to the council members. (**Order #P-787**)
- Individuals who responded to a "Community Leader Survey" that was distributed to "community organizations, social agencies and educators" did so in their professional capacity. As such, the Commission ruled that the names of those who participated were not "personal information." (**Order #P-788**)
- The business addresses of the Chair and Vice-Chair of a Commission or of a Board of Trustees are not "personal information." (**Orders #M-158, P-528**)
- Information about payments made to reimburse individuals for expenses incurred during the course of carrying out their duties as public employees or co-op students does not qualify as personal information (**Order #M-106**). Therefore, the credit card charges for such expenses are accessible. This would include the reference number to each transaction, the cost and the name of the retailer at which the charge was incurred. (**Order #M-333**) As well, information about payments made to individuals who have provided services to an institution on a fee-for-service basis is not personal information (**Order #M-107, M-108, M-333**)
- Correspondence sent or received by a solicitor, solely in his or her capacity as the representative of a client, is not personal information of the solicitor. (**Order #M-57**)
- Where records about the circumstances surrounding the accidental release of an inmate from a jail contain factual information about which employees of the jail were on duty and what their tasks were, that information is not personal information about those employees. (**Order #P-289**)



- Where a company, during a tender, provides an institution with the names of individuals who had worked on past accounts, the names are not "personal information." The individuals are named in their professional and not their personal capacities. (**Orders #P-418, P-419, P-420**)
- The names and titles or affiliations of individuals consulted by an institution during a study are not personal information. The individuals were institutional employees, group presidents, managing directors or their delegates. The views and opinions were expressed in each individual's professional capacity and are not "personal" views. (**Order #P-427**) Similarly, where views and opinions about a program are expressed in an individual's capacity as a publicly elected official, the views and opinions do not contain personal information. (**Orders #M-113, M-114, M-115**)
- A letter of complaint signed by an individual in his or her employment capacity on behalf of a corporation does not contain "personal information" about the author of the letter. (**Privacy Investigation Report #I91-72P**)
- A notebook recording of dates on which named police officers were on duty does not constitute "personal information." (**Order M-223**)
- The name of an analyst of blood samples taken in respect of a police investigation is not "personal information." (**Order #M-249**)
- Municipal councillors notes of events regarding a number of council meetings do not contain the "personal information" of the councillors. Information provided by the Councillors to investigators was provided in a professional capacity or in the execution of employment responsibilities. (**Order #P-631**)
- The names of individuals listed on expense claim receipts provided by employees for reimbursement by an institution were not "personal information." The names refer to individuals in their professional capacities. (**Order #M-412**)
- The legal fees paid by an institution on behalf of an employee who sued for libel arising out of comments made about him in the course of a prosecution did not contain "personal information" about the employee. Moreover, the personal information of other individuals was about them in their professional capacity. (**Order #P-676**)
- The payment or non-payment of a fee to members of a Council is not determinative of whether information contained in records of the Council is "personal information." Since the work of the Council is to carry out the business of government, the minutes of meetings of the Council ought not to be considered the personal information of the members who were so recorded. The minutes reflect the direction in which the meetings proceeded to conduct Council business. The in camera nature of one of the meetings does not alter the characterization of the information related to the Council members. (**Order #P-787**)



- Individuals who responded to a "Community Leader Survey" that was distributed to "community organizations, social agencies and educators" did so in their professional capacity. As such, the Commission ruled that the names of those who participated were not "personal information." (**Order #P-788**)
- The names of the forensic accountants and other employees of a legal firm and the City were provided in the course of executing their employment responsibilities in an investigation of a City employee. These names did not qualify as personal information. (**Order #M-521**)
- The name and address of the director of an association who wrote to a Minister regarding franchising was not personal information because it relates to his professional responsibilities (**Order #P-946**)
- Names, titles and other information about community representatives or leaders and members of the media contained in briefing notes and other records regarding their participation in public events or issues is not personal information about these individuals. Individuals in such positions decide to forego an element of their personal privacy by taking a stand on an issue of importance to them or when attending events which are covered by the press and reported in the media. (**Order #P-978**)

#### The Exceptions: This Information May be Personal Information

- Information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. However, where the information involves the evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information. Thus references in a financial and management audit of a publicly funded residence that relate to the operation of the residence as a whole would not contain personal information of the staff. (**Orders #P-721, P-746, P-757, P-758, P-813, P-814, P-816, P-828**)
- The names or references provided by a consulting firm in respect of proposal are not the personal information of the firm. The firm, and not the principal of the firm, was submitting the proposal. However, the names of the references, though of professionals, were not submitted about them as part of their employment responsibilities; rather, these were individuals that were personally familiar with the firm and as such were their personal information and not that of the firm. (**Order #M-290**)
- A review of a legal services branch of an institution did not necessarily result in personal information being documented about members of the branch. Generalized assertions about working conditions at the branch are not about an individual. If there are specific references to the actions of a particular individual, they may be considered personal information of that individual. (**Order #P-658**)



- Individuals who receive loans from the Ontario Film Development Corporation do so as a 'business activity' and therefore the amount of such loans is not characterized as "personal information." However, the addresses, telephone numbers, citizenship or residency of the individuals were personal information. (**Order #P-729**)
- The mere fact that an individual expressing an opinion on a subject possesses professional qualifications relating to that subject does not make the opinion a professional opinion. For an opinion to lose its character as personal information, the opinion must be provided by the individual in his/her professional capacity and in the course of discharging his/her professional or employment responsibilities. (**Order #M-230**)
- Letters containing the addresses of the writers, information about them and their personal opinions are "personal information." Information that outwardly pertains to a business entity may, in certain circumstances, more properly relate to an identifiable individual. In **Order P-515** some of the contents of two letters referred to the requester as an individual while others pertain to his position as the owner of a business. As a result, some of the information was personal information. (**Orders #113, 139, P-515**)
- Employees that provided information in respect of a review of the practices of the institution did so outside of the employment responsibilities and not in their professional capacity and, as such, the information and the identity of the employees were "personal information." (**Order #P-654**)
- Information in an agreement between the principal of a consulting firm and an institution was personal information because according to the agreement the principal of the consulting firm was to do the work in his personal capacity. (**Order #M-277**)
- In this instance, records created during an employee's bid for promotion contained the personal information of the individual considered for the promotion and others. Recorded personal discussions between individuals concerned non-work-related matters and were therefore personal information even though the records were created in the employment context. (**Order #P-434**)
- An investigation report into expense account irregularities of an employee of an institution contains "personal information." (**Order #P-256**)
- The names of individuals who review films for the Ontario Film Development Corporation were "personal information." (**Order #P-611**)
- The disclosure of the names of authors of a police college research paper on the citizens' complaint system would disclose personal information. The personal information would be the name of the individual together with his or her opinion concerning the process and concerning another individual. (**Order #M-116**)
- Police officers' badge numbers noted in the context of test results obtained during police



training are the personal information of the police officers. (**Order #M-116**)

- The names of individuals who have service contracts with an institution to provide home child care are personal information. (**Order #M-109**)
- Opinions expressed by individuals in their capacity as students, and not as part of their professional responsibilities, are personal information. This is so even where the individuals are taking courses as part of their employment. (**Order #M-116**)
- A list of named employees of an institution who were assaulted in the course of their duties contains personal information. (**Order #M-121**)
- The residential or mailing addresses of physicians are "personal information" since they are distinct from their practice addresses. (**Orders #P-523, P-565**)
- The names of employees of an institution who wrote reports about an internal workplace investigation were "personal information" even though it was part of their job function to do so. (**Order #P-665**)
- The names of physicians who perform certain specialized services was not disclosed in this case because it was determined that the information of the physicians was personal information and that the disclosure of the information would disclose financial information about the physicians. (**Order #P-644**)
- The names of individuals who review drug products for the government are "personal information." Even though the particular drug reviewed may not be associated with the name of the consultant, individuals review products in relation to their own expertise. If individuals know the expertise of the consultant, they could determine which product that individual reviewed. The number of individuals who do these reviews on behalf of the government are very few. (**Orders #P-669, P-235, P-284, P-291**)
- Information relating to an employee is personal information where the employee's actions or employment responsibilities have been questioned and the employee reprimanded. (**Order #M-327**)
- The name, certificate number, home address and home telephone number of electricians and apprentice electricians satisfy the definition of personal information. (**Order #P-755**)
- The number of laboratory tests ordered by each identified physician over a given length of time satisfies the definition of personal information. (**Order #P-778**)
- Letters from a group of parents in which they express their views and opinions about the competence and abilities of a school's staff members constituted personal information about the school employees. Such comments go beyond what would normally be considered to be employment-related information. (**Order #M-486**)



- The names of the duty officer and dispatchers of a Police Service where a complaint was made was personal information. (**Order #M-510**)
- Certain records regarding a fence viewer's award relating to named properties are personal information. (**Order #M-515**)
- Information regarding the investigation of a Corrections Officer's inappropriate conduct with an inmate is personal information. (**Order #P-915**)

## **Information About a Property or a Business**

### Not Personal Information

- Information about a property, a municipal street address and the property's estimated market value is not information about an identifiable individual, and is therefore not "personal information." Addresses or geographical locations, in and of themselves, do not necessarily constitute "personal information." A municipal address itself could not automatically be equated with the address of its owner. Thus, a municipal address or legal description of a property alone would not necessarily reveal information about an identifiable individual. (**Orders #23, P-239, P-295, P-358, M-14, M-15, M-176, M-181, M-197, M-188, M-189**)
- Records regarding work orders issued by a municipality against specified residential properties do not contain personal information. As well, a municipal address was not personal information even where it was contained in a record that dealt with a by-law violation regarding repairs that had to be done at that address. (**Orders #M-14, M-15, M-181**)
- Addresses, licence numbers and date of issue of corporate and partnership taxi licence holders is not personal information. (**Order #M-448**)
- The name, address and telephone number of a kennel is not personal information about the owners of the kennel, even though the address of the kennel is the home address of the owners. Also, the name of the operators of the kennel, and information about an incident which occurred in the course of conducting the business of the kennel relates to the ordinary operations of the business and is not personal information. (**Order #M-454**)
- In light of the Trees Act, the IPC ruled that Notices, as described in the Trees Act are submitted by persons intending to cut trees not for their own personal use, but for commercial or business purposes only. Hence, the information which relates to the names of individuals is not personal information. (**Order #M-522**)
- Drawings of a proposed building renovation submitted to an institution with a building permit application are not personal information about the owner of the building. The



drawings do not reveal or contain information about an identifiable individual, and do not in any direct way relate to a financial transaction involving the individual. (**Order #M-542**)

### Personal Information

- It is possible that information about a business entity could be such that it relates to an identifiable individual, and thus be personal information. This was so in respect of a record containing financial information about the history, management and health of cattle owned by a couple engaged in cattle farming. In this case, the couple's personal finances and the contents of the report were so linked that the record contained personal information. (**Orders #P-364, 113, P-515, M-277, P-701, P-741**)
- Where a contract with a consulting firm that is a sole proprietorship contemplates that the provision of services will be made by the principal of the firm in his personal capacity, the contract for the services is with an individual and thus contains personal information. (**Order #M-277**)
- While certain parts of the water bill contained information about the property, the section showing the payments made on account for water use by a named individual who was a tenant of the property is "personal information." (**Order #M-175**)
- Records containing information about investigations and enforcement steps taken by the County Weed Inspector regarding certain properties did contain personal information. The names of individuals who complained to the inspector and the names of property owners or occupiers who were the subject of investigations are personal information. (**Order #M-176**)
- While the municipal address of a property where a by-law infraction occurred is not personal information, the name of a resident of a particular address, where the resident is an individual, is personal information. (**Order #M-181**)
- The names of owners of particular properties who have been issued building permits are "personal information" if the owners are individuals. (**Orders #M-197, M-331**)
- The name, address and telephone number of an individual that is contained in a building permit application form are personal information. (**Order #M-331**)
- In this case, information about a business where the individual was the sole shareholder and president of the a company whose business affairs and dealings were investigated by the institution was the personal information of the president. (**Order #P-701**)
- Information about the severance payments and the gross earnings of former distributors of



Ontario Lottery Corporation products may be easily attributed to the individuals who controlled the distributorships. The information is therefore "personal information." However, where the names and distribution numbers are severed from the records, the information is not identifiable information about an individual and therefore the Commission ordered that the information be disclosed in anonymized form. (**Order #P-705**)

- When a named individual acquired land, what it consisted of and how much he paid in acreage tax and at what time was personal information about the individual. (**Privacy Investigation Report I94-011P, September 13, 1994**)

#### **Part (b) of the Definition**

- A record containing the number of hours worked by an employee during a particular month does not relate to employment history. (**Order #M-35**)
- The name of an individual combined with his or her current position does not relate to employment history. (**Orders #61, P-284**)
- An Agreement of Purchase and Sale of land between a Township and individual purchasers is personal information as it relates to a financial transaction. (**Order #M-536**)

#### **Parts (b) and (h) of the Definition**

- Information that certain properties were offered to a municipality as potential landfill sites is not "personal information" as it is defined in the Act. This information did not denote a "transaction," which was defined as a "piece of commercial business done." In this case, there was no evidence that the municipality and the owners had entered into negotiations regarding the purchase of properties, nor were any transactions completed. As well, the Commission found that even though the names of the property owners could be discerned from a land registry search, the disclosure was fundamentally about a property and not about an individual. (**Orders #M-188, M-189**)

#### **Part (e) of the Definition**

- An individual's opinions about a non-governmental organization are the individual's personal information. (**Order #P-299**).

#### **Parts (e) and (g) of the Definition**

- Where individual (X) expresses a view or opinion about individual (Y), the Commission has stated that section 2(1)(g) of the Act prescribes that this is the personal information of individual (Y) and not that of individual (X). In this case, the document was a parole



report, in which views and opinions expressed by two of the affected parties concerned the appellant (the person about whom the report was written). The Commission found that the comments constituted the appellant's personal information and not that of the affected parties. (**Order #P-972, M-571**) However, in the context of complaint-driven investigations, whether external or internal and employment related, the personal information collected may be that of the complainant as well as that of the witnesses and the individual being investigated. (**Orders #37, 46, 121, 133, 135, 139, 140, 165, 182, 205, P-221, P-223, P-224, P-237, P-256, P-258, P-266, P-268, P-272, P-274, P-275, P-283, P-292, P-312, P-399, M-41, M-48, M-64, M-82, M-84**)

- Where records are created by a supervisor about an employee in the context of an employment-related matter, for example job performance evaluations, the personal information is that of the employee only. Information created by an employee in the execution of employment responsibilities is not the employee's personal information. (**Orders #194, P-240, P-257, P-326**)
- In this instance, records created during an employee's bid for promotion contained the personal information of the individual considered for the promotion and others. Recorded personal discussions between individuals concerned non-work-related matters and were therefore personal information even though the records were created in the employment context. (**Order #P-434**)
- Statements containing the allegations of individuals who have complained about the behaviour of the requester are "personal information" of the requester and of the individuals who made the statements. (**Orders #37, 46, 121**)
- An Ontario Provincial Police report in respect of the investigation of several police officers contains personal information about those officers. (**Order #P-237**)
- Where a doctor had called into question the ability of the requester to drive a motor vehicle, this information was solely that of the requester. (**Order #P-280**)
- The identity and address of the author of a letter written by an individual is "personal information" of the author of the letter. This is also true of the views or opinions the author of the letter expressed about a service the institution provides. Where the author complained about the conduct of the operator of the service, the comments were the personal information of that individual. (**Order #P-515**)
- The names, addresses and signatures of petitioners who signed a petition requesting the establishment of a formal commission of inquiry to investigate the affairs of a Township are "personal information." (**Order #P-516, M-580**)
- Information provided in a job competition by two individuals who were references for the appellant contained views and opinions about the appellant and were the personal information of the appellant only. (**Order #P-773**)



## Part (h) of the Definition

- While a name alone cannot be considered personal information, where a name appears in the context of a request for access to information under the Act, disclosure of the name would reveal both the fact that the original requester made a request under the Act and the nature of the request. As a result, a name in this context is personal information. (**Orders #27, P-216, P-370, P-539**)
- Disclosure of the name of a deceased individual would disclose personal information about an individual. In this case, the police had disclosed information about the date, time and place of the discovery of the death of the deceased person. Disclosure of the identity would therefore reveal other personal information about the individual. (**Order #M-97**)
- The vacation and sick days actually taken by an employee of an institution constitute "personal information." (**Order #M-141**)

## "PERSONAL INFORMATION BANK"

- A solicitor's file containing personal information is a personal information bank as defined in the Act. (**Privacy Investigation Report #I92-14M**)

s.2(3)

MFIPPA

## Definition of "Institution"

- In order to determine whether the members or officers of the Renfrew Industrial Commission are appointed or chosen by or under the authority of the council of a municipal corporation, the corporate history of the Commission was reviewed. The Commission found that, as of the dates of the request and the appeal, neither the members nor the officers of the Commission were appointed or chosen by or under the authority of the Town Council as contemplated by this provision. In a postscript, the Commission stated that it accepts the validity of the documents filed regarding its corporate history. It noted, however, that where it is alleged that the documents filed under the Corporations Act are invalid, then the procedure under the Corporations Act ought to be followed. The Commission lacked jurisdiction to deal with that matter. (**Order #M-343**)
- The Temagami Non-Profit Housing Corporation (the Corporation) was held to be an institution in accordance with this section. The term "officers" along with "members" in this section is intended to identify the principle directing or controlling minds of a wide variety of entities, including those mentioned in ss.(1)(b). Hence, the term "officer" encompasses the controlling or directing minds of a non-profit corporation, namely its board of directors, whether or not directors are otherwise described as "officers" in the corporate documents. The purpose of this section is to include within the definition of "institution" those bodies controlled by municipalities in the most direct way by virtue of



the power to appoint the body's "members" or "officers." This result would not necessarily be achieved if this test were applied at a secondary level of management. By by-law the Corporation had established the board of directors as the "directing mind" of the Corporation. Moreover, while the directors are chosen by the members, he or she must be approved by the municipality. Because the approval of the municipality is a necessary condition for the appointment of a director, the municipality has control over who is to be elected or appointed to the board. Therefore, the directors are appointed or chosen "under the authority" of the municipality. As well, the Commission held that where the by-law of the Corporation required the "municipality itself" to approve the directors, this was the equivalent of term "council of the municipal corporation" as found in this section. (**Order #M-415**)

## **"RECORD"**

- The definition of a "record" is broad. Subject to the special provisions dealing with machine readable records, an institution is not obliged to create a record in response to a request. Although the creation of a record is not generally required, it may, in certain circumstances, be in keeping with the spirit and purpose of the Act to do so. (**Orders #17, 19, 50, 99, 196, P-231, M-33**)
- Notes kept by a court reporter during a hearing were a "record" even though no transcript had been produced. (**Order #52**)
- Tape recordings of hearings of a Board were "records" under the Act even though they were only used as memory aids to the scenographer who also kept notes of the proceedings. (**Order #P-912**)
- Files in a hard disk drive constitute 'a machine readable record' as contemplated by this section. A copy of those files on diskette is also a record that is capable of being produced from a machine readable record. (**Order #M-369**)







## FIPPA

No comparable section

## MFIPPA

DESIGNATION OF HEAD s.3

(1) The members of the council of a municipal corporation may by by-law designate from among themselves an individual or a committee of the council to act as head of the municipal corporation for the purposes of this Act.

(2) The members elected or appointed to the board, commission or other body that is an institution other than a municipal corporation may designate in writing from among themselves an individual or a committee of the body to act as head of the institution for the purposes of this Act.

### IF NO DESIGNATIONS

(3) If no person is designated as head under this section, the head shall be,

- (a) the council, in the case of a municipal corporation; and
- (b) the members elected or appointed to the board, commission or other body in the case of an institution other than a municipal corporation.



## PART 1

### ADMINISTRATION

#### FIPPA

##### S.3 RESPONSIBLE MINISTER

The Lieutenant Governor in Council may by order designate a minister of the Crown to be the responsible minister for the purposes of this Act.

#### MFIPPA

No comparable section



## FIPPA

### s.4 INFORMATION AND PRIVACY COMMISSIONER

(1) There shall be appointed, as an officer of the Legislature, an Information and Privacy Commissioner to exercise the powers and perform the duties prescribed by this or any other Act.

#### APPOINTMENT

(2) The Commissioner shall be appointed by the Lieutenant Governor in Council on the address of the Assembly.

#### TERM AND REMOVAL FROM OFFICE

(3) The Commissioner shall hold office for a term of five years and may be reappointed for a further term or terms, but is removable at any time for cause by the Lieutenant Governor in Council on the address of the Assembly.

#### ASSISTANT COMMISSIONERS

(4) The Commissioner shall appoint one or two officers of his or her staff to be Assistant Commissioners.

## MFIPPA

No comparable section







## FIPPA

### S.5 NATURE OF EMPLOYMENT

(1) The Commissioner shall work exclusively as Commissioner and shall not hold any other office under the Crown or engage in any other employment.

(2) The Public Service Act and the Public Service Pension Act do not apply to the Commissioner.

## MFIPPA

No comparable section







## FIPPA

S.6

### SALARY

(1) The Commissioner shall be paid a salary to be fixed by the Lieutenant Governor in Council.

### IDEM

(2) The salary of the Commissioner shall not be reduced except on the address of the Assembly.

### EXPENSES

(3) The Commissioner is entitled to be paid reasonable travelling and living expenses while absent from his or her ordinary place of residence in the exercise of any functions under this Act.

### PENSION

(4) Part II of the Legislative Assembly Retirement Allowances Act, except sections 15 and 16 and subsection 18(5), applies with necessary modifications to the Commissioner in the same manner as if the Commissioner were a member of the Legislative Assembly and for the purpose,

"average annual remuneration" means the average annual salary of the Commissioner during any five years of his or her service, which years need not be consecutive, during which his or her salary was highest; ("rémunération annuelle moyenne")

"remuneration" means the salary of the Commissioner. ("rémunération")

## MFIPPA

No comparable section







## FIPPA

### S.7 TEMPORARY COMMISSIONER

If, while the Legislature is not in session, the Commissioner dies, resigns or is unable or neglects to perform the functions of the office of the Commissioner, the Lieutenant Governor in Council may appoint a Temporary Commissioner to hold office for a term of not more than six months who shall, while in such office, have the powers and duties of the Commissioner and shall be paid such salary or other remuneration and expenses as the Lieutenant Governor in Council may fix.

## MFIPPA

No comparable section







## FIPPA

s.8

### STAFF

## MFIPPA

No comparable section

(1) Subject to the approval of the Lieutenant Governor in Council, the Commissioner may employ mediators and any other officers and employees the Commissioner considers necessary for the efficient operation of the office and may determine their salary and remuneration and terms and conditions of employment.

### BENEFITS

(2) The employee benefits applicable from time to time to the public servants of Ontario with respect to,

- (a) cumulative vacation and sick leave credits for regular attendance and payments in respect of such credits;
- (b) plans for group life insurance, medical-surgical insurance or long term income protection; and
- (c) the granting of leave of absence,

apply to the employees of the Commissioner and where such benefits are provided for in regulations made under the Public Service Act, the Commissioner, or any person authorized in writing by him or her, may exercise the powers and duties of a minister or deputy minister or of the Civil Service Commission under such regulations.







## FIPPA

### S.9 PREMISES AND SUPPLIES

(1) The Commissioner may lease any premises and acquire any equipment and supplies necessary for the efficient operation of the office of the Commissioner.

#### Audit

(2) The accounts and financial transactions of the office of the Commissioner shall be audited annually by the Provincial Auditor.

## MFIPPA

No comparable section







FIPPA, PART II

MFIPPA, PART I

FREEDOM OF INFORMATION  
ACCESS TO RECORDS

FIPPA

MFIPPA

s.10

Right of Access

s.4

(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22 (FIPPA)/sections 6 to 15 (MFIPPA).

SEVERABILITY OF RECORD

(2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 (FIPPA)/sections 6 to 15 (MFIPPA), the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.







## ss.(1)--Right of Access

Frivolous or Vexatious Requests

- Institutions are not authorized to refuse to respond to a particular request on the basis that the request is frivolous or vexatious; a legislative amendment would be required to permit the Commission to uphold an institution's decision not to disclose information on that basis. Nonetheless, the Commission may invoke conditions on processing requests where the requester has engaged in a course of conduct which constitutes an abuse of process. If an institution believes that a requester is engaged in an abuse of process, the institution should issue a decision letter outlining this fact, which the requester can appeal. Factors considered by the Commissioner in determining whether a requester is engaged in an abuse of process are: (1) whether the volume of requests or appeals are excessive or unreasonable to administer, (2) whether by virtue of the nature, scope or rate of requests, the requester has demonstrated no genuine interest in the information for its own sake, but instead is interested in the nuisance value generated for an institution, (3) information indicating that the requester's objective is to harass or burden an institution. (**Order #M-618**)

No Right of Access1. Court Ordered Non-Disclosure

- Where during the course of an appeal a court makes an order that restricts disclosure and dissemination of the material that is under appeal, the court order binds the Information and Privacy Commission and the records are not accessible under FIPPA\MFIPPA. The Commission may not do anything in processing the appeal that would render the order ineffectual. (**Order #M-53**)

2. Records That Do Not Exist

- Requesters have no right, subject to the regulation dealing with machine-readable records, to require an institution to create a record in response to a request. Requests are for information contained in a record existing at the time the request is made. (**Orders #99, P-562, P-931**)
- Where requests are made in the French language, under the French Language Services Act, a ministry is required to respond in French under the Act. However, the ministry is not required to translate any responsive records. This would result in the institution having to create a record in circumstances in which it is not obliged to do so. (**Order #P-562**)



### 3. Records Governed by Federal Legislation

#### A. Wiretap

- Requests for wiretap application records are outside of the scope of Ontario's access and privacy legislation. This is because the Criminal Code deals with access to records of this nature and as a result a provincial statute cannot, given the doctrine of federal legislative paramountcy, apply. This is so whether the wiretap record exists or not. (**Orders #P-344, P-368, P-378, M-202, P-625**)

#### B. Young Offenders Act Records

- The records provisions of the Young Offenders Act (YOA) are expressly contradicted by the Freedom of Information and Protection of Privacy Act (FIPPA). This contradiction applies not only to requests for YOA records (and Juvenile Delinquents Act records, which are included in the records scheme of the YOA) but also to the ability of the Commission to obtain these records during an appeal. In essence, the YOA contains a comprehensive records scheme that deals with disclosure of these records in restricted circumstances. Given the doctrine of federal legislative paramountcy, the YOA provisions prevail over FIPPA and YOA records fall outside the scope of FIPPA. In order for the Commission to determine whether a record is in fact a YOA record, an institution must forward an affidavit to the Commission during an appeal. The affidavit must contain the following information:
  - (1) it must contain information about the person swearing the affidavit describing his or her qualifications and responsibilities;
  - (2) it must state that the person is familiar with the withheld records and the subject matter of the records;
  - (3) it must describe the records withheld in reasonably specific detail (without revealing the content of the record), correlate each record to the provisions of the YOA asserted and demonstrate how the required elements of each provision are satisfied (e.g., how the records relate to an offence under the YOA and how disclosure would serve to identify the persons as having been dealt with under the Act);
  - (4) it must set out the purpose for which each record was created and the circumstances under which each record was created. (**Orders #P-378, P-446, P-736, P-737**)
- In accordance with the doctrine of federal legislative paramountcy, the Young Offenders Act (YOA) prevails in respect of records kept by a provincial institution under section 43 of the YOA. Nevertheless, in respect of YOA records, the Commission has a duty to ensure that the records are not improperly withheld from scrutiny under FIPPA on the basis that they are "YOA records." In this case, the record concerned a workplace harassment complaint about the conduct of certain employees of the institution in relation to other employees. The workplace in this case was a young offender facility. The investigation that led to the creation of the record was not conducted for the purpose of investigating an offence alleged to have been committed by a young person; for use in proceedings against a young person; or for any other type of activity outlined in sections 40, 42, 43 or the YOA. Even if the record in question was found to be a record within the meaning of the YOA, the Commission would



not be in conflict with a federal statute in dealing with disclosure of these records. The severed record, which was ordered disclosed, did not contravene section 46 of the YOA in that it did not identify a young person as an individual who was dealt with under the YOA. (Order #P-446)

- Despite **Order P-378**, the Commission subsequently ruled that it has the right to determine whether records are young offender records governed by the Young Offenders Act or not in order to decide the jurisdictional issue. Therefore the Commission ordered the institution to forward the records to the Commission for review. (**Orders P-736, P-737, P-804**)
- The non-disclosure provisions in s.38(1) and s.46(1) of the Young Offender's Act do not apply to someone who is deceased. In this case, the Young Offender's Act did not apply to records of an investigation into the unreported disappearance from a group home of a crown ward who was deceased at the time of the access request. (**Order #P-991**)

#### C. Interprovincial Undertakings

- While the Act applies to an interprovincial undertaking such as Ottawa-Carleton Regional Transit Commission (OC Transpo), it does not apply to certain records where the disclosure would clearly affect the working conditions, labour relations or a vital part of the management and operation of the institution. Records regarding a grievance proceeding relate to labour relations. Disclosure of the grievance file would impact on grievance procedures and would clearly affect labour relations. As a result grievance records, in respect of OC Transpo, are not covered by the Act. (**Orders #M-159, M-160. Summary of M-160 is below under "Right of Access."**)

#### 4. Correspondence With the Information and Privacy Commission

- Where an institution receives a request for access to a number of Freedom of Information appeal files that the institution had previously opened to respond to earlier access requests made by the same requester, access may be denied based on the fact that there is no right of access under this section. The records were generated during the mediation stage of the appeals process and included correspondence between the institution and the Commissioner's office. The process envisaged by the Act was not intended to be used to allow a requester to obtain access to this information; the process should not result in the same information having to be considered in two separate appeals. The reasons for the Commissioner's decision are as follows: the Commissioner's office has the right to control its own process; the records may contain the same information that was the subject of the original appeal that was not disclosed; and, to grant access to these records would encourage duplicate appeal proceedings and militate against finality in the appeals process. The Act would apply, however, to records that were generated internally by the institution in dealing with an appeal. (**Order #P-537**)
- Correspondence between the Commissioner's office and an institution exchanged following



the inquiry stage and which related directly to the disposition of an appeal is not privileged under s.52(9) [FIPPA] \ s.41(9) [MFIPPA]. Such correspondence is nevertheless outside of the purview of the Act (see s.10 [FIPPA] \ s.4 [MFIPPA], **Order #P-537**). However, correspondence between an institution and the Commissioner's office, which are of a purely administrative nature and do not pertain directly to the substance of an appeal, are not privileged under this section and are within the purview of the legislation. Since no other exemptions under the Act applied to the record, it was ordered disclosed. (**Order #P-592**)

### **Records not responsive to request**

- Where an individual requested all records held by a Police Service regarding a charge laid against the individual, all the records which related directly or indirectly to the individual or his or her matter were responsive to the request. Pages in a police officer's note book relating to other arrests or investigations were not responsive to the request. (**Order #M-514**)
- A portion of a computer generated page of information on a computer screen containing computer codes within a specific module in the police records system was not responsive to the request even though another portion of the page concerning a legal process involving the requester was responsive to the request. (**Order #M-517**)

### Right of Access

#### 1. Interprovincial Undertakings

- Records created by a federal Crown Corporation that are in the custody or under the control of a provincial or municipal institution are governed by FIPPA\MFIPPA, where the disclosure would not paralyse the Crown Corporation and where the disclosure would not conflict with federal law. Both the federal and provincial access and privacy statutes contemplate that from time to time either or both may have the records of the other. (**Orders #P-270, P-241. In Tim Grant v. Atomic Energy of Canada Ltd. and the Attorney General of Canada, the Federal Court of Canada, Trial Division, ruled that, given s.37 of the Canada Evidence Act, the information ordered disclosed in Order P-270 would be injurious to the public interest in national security. Thus the evidence was not admissible in a judicial proceeding and therefore in the judicial review that was pending. [Court File DES-2-93, August 8, 1994, D.McGillis J.]**)
- A transit commission, the Ottawa-Carleton Regional Transit Commission (OC Transpo), which is governed by federal labour laws, is nonetheless an institution covered by MFIPPA. The federal aspect of the institution is that it provides interprovincial service. As a result it is governed by federal labour laws. The MFIPPA is a law of general application that will apply to OC Transpo where the records do not apply to working conditions or labour relations and where disclosure of the records would not affect a vital part of the management or operation of OC Transpo. (**Orders #M-13, M-159, M-160**)
- Section 350 of the federal Railway Act provides for the confidentiality of certain information



given to the National Transportation Agency. The Commission ruled that the provision has no application to records supplied to institutions governed by Ontario's access and privacy legislation. It was noted that some of this information may have inherent economic value. (Order #P-647)

## 2. Records Governed by Federal Legislation

### A. Young Offenders Act

- Records concerning an internal investigation into the operation of a training school and the conduct of certain employees of the ministry are not Young Offenders Act records. The records were not created for the purpose of investigating an offence alleged to have been committed by a young person. As a result the provincial access and privacy statute applies and not the Young Offenders Act. (Order #P-352)
- Where a record concerns an internal investigation into the operation of a training school and the conduct of its employees, it is not a Young Offenders Act record. The record does not relate to an offence that may have been committed by a young person, nor was it created for the purpose of investigating an offence alleged to have been committed by a young person. (Re Solicitor General of Ontario et al. and Assistant Information and Privacy Commissioner et al., (1993), 102 D.L.R. 602 (Ont. Div.Ct.))

## 3. Records responsive to request

- When an institution creates a record in response to a request, then factual information that places the requested information in context e.g. a disclaimer notice regarding property assessment values is also responsive to the request. (Order #P-954)
- While cover pages and dates of funding proposals were found to be not responsive to a prior request, the wording of the new request which is for all information related to the funding of the project and the character of the documents make them relevant in this case. (Order #P-970)

## 4. General

- Where a third party that has been given notice under this section provides representations to an institution, access requests for that material are to be treated as general requests which are governed by the exemptions in the Act [FIPPA \ MFIPPA]. While s.52(13) [FIPPA] \ s.41(13) [MFIPPA] states that parties are not entitled to access to another party's representations at the appeal stage, there is no equivalent provision in respect of access to such representations at the request stage. (Order #78)
- The Psychiatric Patient's Advocacy Office was part of the Ministry of Health and thus its records were covered by the Act. While the office had entered into a Memorandum of



Understanding with the ministry, it did not provide that the ministry had abdicated responsibility for the Office. The Commission held that the office was fundamentally part of the ministry and was an internal program of the ministry. (Order #P-494)

- Records of the Judicial Appointments Advisory Committee were covered by the Act. The Commission ruled that the Committee was a part of the Ministry of the Attorney General for a number of reasons including that the mandate of the Committee was related to the functions of the ministry, the ministry funds the operations of the Committee and provides administrative support and the Committee's offices are located on the premises of the ministry. (Order #P-704)
- Providing access to information under the Municipal Freedom of Information and Protection of Privacy Act does not constitute an infringement of copyright. Specifically, sections 27(2)(I) and (j) of the Copyright Act provide that disclosure of information pursuant to the federal Access to Information Act or any like Act of the legislature of a province does not constitute an infringement of copyright. (Orders #M-29, M-542)
- Where a request is received for general information which may be located in a portion of a record(s) (as opposed to a request for specific records) an institution is obligated to respond only to the portion of the record which is responsive to the information requested rather than the entire record. Institutions should also consider whether the information at issue is meaningful if it is only a portion of a larger document. (Order #P-880, P-970, P-971)

#### 5. Patients' Right of Access to His or Her Medical Records

- In the absence of legislation, a patient is entitled, on request, to examine and copy all information in his or her medical records which the physician considered in administering advice or treatment, including records prepared by other doctors that the physician may have received. The patient's general right of access to medical records is not absolute. If the physician reasonably believes it is not in the patient's best interests to inspect the medical records, access may be denied. Denial of access should be made in exceptional circumstances where there is significant likelihood of a substantial adverse effect on the patient's physical, mental or emotional health or harm to a third party. (McInerney v. MacDonald (1992), 93 D.L.R. (4th) 415 (S.C.C). This case is included here for the assistance of readers even though the freedom of information and privacy legislation do not apply to the private sector.)

#### **ss.(1)--Custody or Control**

##### Factors to be Considered

- Some of the factors that may be considered in determining custody or control are: 1. was the record created by an officer or employee of the institution? 2. what use was intended to be made of the record? 3. did the institution have possession of the record? 4. if the institution did not have possession, was it created as a result of the duties of an employee and is it being



held by the employee? 5. does the institution have the right to possess the record? 6. does the content of the record relate to the institution's mandate and function? 7. does the institution have the authority to regulate the record's use? 8. to what extent has the record been relied upon by the institution? 9. how closely is the record integrated with other records held by the institution? 10. does the institution have the authority to dispose of the record? The term "custody" should be given broad meaning and only in rare circumstances would physical possession not suffice as custody. In **Order #120** notes made by an employee while she was a panellist in a job competition were found to be in the control of the institution even though she had taken the notes home. (**Orders #120, P-257, P-267, P-271, P-326, M-165, P-505, M-315, P-704, M-387, P-794, M-430, P-822, M-506, P-994, )**

- Bare possession is not sufficient to base a finding that the record is in the "custody" of the institution; there must be some right to deal with the records and some responsibility for their care and protection. (**Orders #P-239, P-271**)
- Records of political staff that relate to political matters may be in the custody or control of an institution where the records are kept, maintained or stored together with other government records. (**Order #P-267**)
- While this section does not state at what point in time the institution has custody or control over the records subject to a request, the intent of the Act is clear that the relevant date is the date upon which the request was received by the institution. The institution cannot divest itself of custody or control of records in the midst of an appeal. (**Order #M-430**)

#### Records that are in the Custody or Under the Control of the Institution

- Only one part of the test needs to be met; that is, custody or control. Even where the institution maintains copies of a record produced in whole or in part by another organization, such records are in the custody of the institution. Where the contract between the institution and third party states that the reports belong to the institution, control lies with the institution. (**Orders #41, P-257**)
- Notes and diary entries about properties being inspected related to the employment responsibilities of the Fire Prevention Officers, who created the records and were therefore in the custody or control of the institution. This was so even though the notes were voluntarily created and were not kept with the regular institutional files. (**Order #M-59**)
- Records kept by a supervisor about an employee are in the custody or control of the institution even though the records are created voluntarily. Here, the records were created by a supervisor during the course of employment and described events that took place at the workplace in the context of supervision of an employee. As well, a copy of the record was provided for use in a grievance. (**Order #P-326**)
- Records are in the custody and control of an institution and governed by the Act even though they were obtained from the requester and regardless of whether copies of the records were



previously provided to the requester. (Order #P-332)

- A report submitted to an institution by a third party is in the "custody or control" of an institution. (Order #3)
- Day Nursery Health Inspection Reports were in the custody of the Ministry of Community and Social Services where the institution was required to receive them under the Day Nurseries Act. (Order #P-257)
- In this case, the appellant's medical record was sent to the police by a hospital in which the appellant was a patient. The appellant had consented to the disclosure. The record was kept in the police files and was therefore in the custody or control of the police even though they did not request that the document be sent to them. (Order #M-128)
- Simply providing records to the Commission's office in an appeal does not, in and of itself, prejudice the position of an institution that it does not have custody and/or control of those records. The Psychiatric Patient Advocate Office (PPAO) is part of the Ministry of Health and, as such, its records are in the custody or control of the ministry. This was so even though the PPAO and the ministry had entered into a Memorandum of Understanding that provided that the PPAO is responsible for maintaining confidential records relating to its advocacy operations. The Memorandum did not mean that the PPAO had exclusive custody or control over records which it had a responsibility to maintain to the exclusion of the ministry. (Orders #P-494, P-509)
- Records related to a tender for the development of non-profit housing held by the Ministry of Housing were in the custody or under the control of the ministry. The bids were provided directly to the architect employed by the non-profit group by the contractors. The architect then provided the bids to the ministry. The ministry accepted or rejected the project architect's assessment of the bids and where it disagreed with the assessment or with the non-profit group's choice of bid, it could refuse to fund the housing project. (Order #P-610)
- The Commission ruled that the Ministry of Consumer and Corporate Relations had "control" over examination papers taken by individuals applying to be licensed as Real Estate Brokers. While the Ontario Real Estate Association was not an institution under the Act, it, as the nominee of the Registrar of Real Estate and Business Brokers, conducts and administers training programs which include the testing of examinees. The Real Estate and Business Brokers Act provides that the Registrar or his or her nominee review the examination paper on request where an individual fails the exam. The Registrar has the statutory right to compel the production of a copy of the examination in these circumstances. Therefore, the Commission ruled that, for the purpose of reviewing the marking of an examination, the Registrar, and hence the ministry, had control over the records. The Commission went on to note that the institution's retention schedules ought to be amended to ensure that the records would be kept in future. (Order #P-629)



- In this case the notes of a member of the Social Assistance Review Board, which were contained on a preprinted form entitled 'Record of Hearing', were assumed to be in the custody or control of the board and governed by the access and privacy legislation. (**Order #P-648**)
- Records in the custody of lawyers who have been privately retained by an institution are still in the "control" of the institution. As well, s.6(6) of the Solicitors Act confirms that the records are fundamentally those of the client and that they shall be returned to the client on payment of the fee. In essence, the lawyer holds records as an agent of the client. (**Order #M-315**)
- The records of the Judicial Appointments Advisory Committee were in the custody or under the control of the Ministry of the Attorney General. The Committee operated as a part of the Ministry of the Attorney General (see above under "Right of Access"). The Commission found that the records kept by the Committee members were under the control of the ministry. The Commission considered that the records were in the Committee members' control or custody because of their responsibilities as members, that the records may be relied upon in determinations made as part of the members' responsibilities and that the Committee is part of the ministry. (**Order #P-704**)
- Court reporters' notes taken at Criminal Code Review Board hearings were held to be in the custody or under the control of the Board. The Commission found that in this case the reporter acted as the trustee or repository of the notes or tape recordings created as a result of an engagement with the Board. The right of control over such records remained with the Board and the Board's consent was required before a transcript may be ordered by any party to a Board proceeding. (**Order #P-822, see below Orders 52, 119 where court reporters' notes were held not to be in the custody or control of the institution.**)
- The Commission ruled that tape recordings, created by a court reporter during a hearing of the Ontario Criminal Code Review Board (OCCRB), are in the control of the institution, the OCCRB. The OCCRB did not have custody of the tapes but it did have control over the tapes in that it's consent was required before a transcript could be issued. The fact that the tapes were only a "back-up" of stenographic notes did not change this analysis. (**Order #P-912**)
- Where a municipality passed a resolution stating that the administrator is not required to submit a detailed listing of chargeable calls for the administrator's cellular phone, this did not dispose of the issue of whether the municipality had custody or control of the requested records. Despite the resolution, the Commission found the municipality remained in complete control of whether it chooses to exercise its right to possess the records. Thus, even though an institution is not "required" to keep a record, the Commission can make a determination that the record is under the custody and control of the institution. In a postscript in this case, the Commission stated that the above is particularly true when the record deals with expense claims in a public institution because there is a public expectation that the expense claim verification process is being properly administered. (**Order #M-452**).



## Records Not in the Custody or Under the Control of the Institution

- Although the Ministry of the Attorney General may be in "possession" of records relating to a court action in a court file, because of the Ministry's limited ability to use, maintain, care for, dispose of and disseminate these records, the Ministry cannot be said to have custody or control over these records for purposes of the Act. Accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the Act. The same principles apply to records in files maintained by Justices of the Peace. However, copies of court records which exist independently of the "court file" are within the custody or control of the institution possessing them and therefore, are subject to access under the Act. Court records are those records which relate to a court action and which are found in a court file. In this case, an "information" or a record which confirms that an individual attended at Court to swear an "information" before a Justice of the Peace and which are located in a court file would fall outside the Act. **(Order #P-994)**
- An institution does not have custody of a court reporter's notes where the notes are not delivered to the institution or to the reporter's employer. In order to establish control of a court reporter's notes, the institution's procedures must be considered. If any member of the public can gain access to the notes, then the institution does not have control. If the institution must approve production or distribution of notes, then the institution has control. In order to determine the issue, one can look to relevant legislation, contracts or practices. **(Orders #52, 119, P-822 (above) contra regarding court reporters notes taken at the Criminal Code Review Board.)**
- The records in the possession of the community college ombudsman are not in the custody or under the control of the college where the ombudsman is not subject to the direction of the college, and the college has no rights of access to the ombudsman's files. The college ombudsman was appointed by and reported to a committee on which the college did not hold majority membership. Funding for the ombudsman office was shared equally by the college and the students' association. The college had formally agreed that it was precluded from any direct or indirect dealings with the college ombudsman's files. The records are kept and retained separately from the institution. **(Orders #P-271, P-509)**
- Records concerning the names of companies that obtained the services of employees as a result of the Futures program are not in the custody or control of the Ministry of Education. Futures program delivery organizations are not agents of the ministry. The program is delivered on a purchase of service basis through a transfer payment contract with the Youth Employment Counselling Centre. Information about employers is not forwarded to the ministry. **(Order #P-384)**
- Where a tribunal board member's personal notes about a hearing are not kept on the board's premises, they are not in the custody or control of the board. The board does not regulate the use of the notes and takes no steps to exert control over them. In this case the notes were created by the board member for her own personal use and, according to the representations,



the member never allowed any other person to see, read or use the notes for any purpose. The Commission noted that if the notes had been contained in the appellant's appeal file or in any other record-keeping system over which the board had administrative control, they would properly have been considered in the custody or control of the board, and governed by the Act. (**Orders #P-396, P-505**)

- Notes made at an Ontario Municipal Board hearing by a board member who presided at the hearing are not under the custody or control of the board. The notes were located outside the board's premises in the Board member's personal possession in his home. The board does not require that its members take notes at hearings, nor does it regulate the use of the notes or exert any control over them. They were created by the Board member for his own personal use. As per the member's practice, he destroyed the notes shortly after he issued his final order in the hearing. An affidavit from the Manager of Finance and Administration confirmed these facts. (**Order #P-505**)
- Where a record contains legal advice provided to an employee in his or her personal capacity from a privately retained lawyer, the record is not in the custody or control of the institution. This is so even though the record contains information regarding the appellant that is referable to the request. In this instance, the record was not created as part of the employee's duties, the institution had no right of possession by statute or otherwise, the institution had no authority to regulate the use of the record, the record was never relied on by the institution and the record was never in the possession of the institution. (**Order #P-451**)
- Working papers created by an external auditor who conducted an audit of an institution's financial records were not in the custody or under the control of the institution. In this case the institution was a Board of Education that had the audit done under s.234(2) of the Education Act. The Act requires that the auditor be independent of the board. The working papers were never in the possession of the board and there was no legal right for the board to obtain copies of the papers. The papers are not relied on by the board and have no relation to any other records that the board keeps. As a result, the working papers regarding the audit were not subject to an access request under the Act. (**Order #M-152**)
- The background notes and test results kept by an independent psychologist, engaged occasionally by a police force to do assessments of candidates who were being considered for promotion, were not in the custody or under the control of the police force. The psychologist provided a brief summary of the psychological report to the promotion committee. The candidate received a copy of the full report. The police force did not obtain the background notes or test results or a full copy of the report. The records were kept in the psychologist's private office and were never received by or integrated with the police force records. (**Order #M-165**)
- The report of an engineering consulting firm was held to not be in the custody or under the control of a Town. The report was not created for or on behalf of the Town, but rather, was created independently by the Town's insurers as a result of a claim filed against the Town. The Town did not have the right to either obtain, retain or dispose of the report. The record



was never in the custody of the Town or any of its officials and had never been seen by any officer of the Town. (**Order #M-387**)

- Records relating to tenders for the operation of Jobs Ontario training programs in several counties were held not to be in the custody or under the control of the Ministry of Education and Training. The Commission found that the programs were operated through independent brokers who were solely responsible for the programs. Moreover, the institution's staff did not create the records and did not have custody of them except in exceptional circumstances and such custody would be intermittent. The institution had no authority to regulate the use or disposal of the records held by the brokers. (**Order #P-794**)
- A diary entry and a request for legal advice were not under the custody or control of an institution where these records were created by senior employees who were engaged in a dispute with their employer arising out of their employment relationship. (**Order #M-462**)
- Records in the custody of a lawyer hired as an investigator to provide an impartial and independent inquiry into a complaint were prepared for his own benefit and do not fall within the categories set out which indicate custody or control. In this case, the terms of the agreement between Hydro and the lawyer setting out the conditions of his employment and the maintenance of the records led the Commission to conclude there is no control over the investigation records by Hydro. (**Order #M-506**)
- This section permits institutions to withhold parts of records on the basis that they are not responsive to a request. (**Order #P-913, P-970, P-971**)

### **Appeal process**

- The requester can not expand the nature of the request during the appeal process. In addition once an appellant has narrowed an appeal, the appellant can not reintroduce the excluded information later. (**Order #P-972**)

### **ss.(1)--Record**

- While there is, generally, no duty to "create" a record in response to a request, creation of a record is sometimes consistent with the spirit of the Act, and enhances the purpose of the Act in respect of access. The Commissioner, however, has no power to order the institution to create a record when no record exists. (However, in **Order #M-18** the Commissioner ordered an institution to create a record containing salary range.) (**Order #99**)

### **ss.(2)--Severance**

- The head cannot rely on exemptions without first considering whether parts of the record could be disclosed without revealing exempt material. The key issue is reasonableness. A valid severance provides the requester with information responsive to the request. (**Orders #14, 20, 22, 24, 30, 40, 43, 48, 49, 56, 57, 64, 72, 92, 123, 124, 134, 150, 159, 180, 187, P-**



- Where exempt and non-exempt information is so interwoven that a reasonable severance is not possible, the record may be exempt in its entirety. (**Orders #196, P-323, M-69**)
- This subsection applies to the law enforcement exemption even though s.10(2) [FIPPA] \ s.4(2) [MFIPPA] refers to the content of a record, while s.14(2)(a) [FIPPA] \ s.8(2)(a) [MFIPPA] exempts a class of record--a "report." If all of the record is a "report" and is determined to be within ss.(2)(a), it may be exempt in its entirety. (**Orders #30, 38, 94, 124, 134, 137, 200, P-221, P-239, P-250**)
- Nothing in the Act permits an institution to sever out information in a record because the requester already knows that information. (**Order #210**)
- In this case the Commission ordered the institution to sever information related to a request and as a result the anonymized record was ordered disclosed as it was not exempt under the Act. (**Order #M-264**)
- The Commission may refuse to provide an institution with a second opportunity to consider the issue of severance when experienced staff in the institution could have done this when the original decision letter was issued. (**Order #P-771**)
- The Ontario Divisional Court ruled that in applying this provision the Commissioner approached the issues too narrowly, in that he considered the amended record and determined that it did not fall within one of the exemptions. The Commissioner should have first considered whether the whole record contained any information which fell within one of the exemptions. If he found that it did, then he should have gone on to consider whether the amended record disclosed information that fell within one of the exemptions. (**Lincoln County Board of Education and Information and Privacy Commissioner/Ontario, Ontario Divisional Court, June 20, 1995, Court File No. 289/93, Justices McMurtry, Sanders and Winkler**).







(1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environment, health or safety hazard to the public.

NOTICE

(2) Before disclosing a record under subsection (1), the head shall cause notice to be given to any person to whom the information in the record relates, if it is practicable to do so.

CONTENTS OF NOTICE

(3) The notice shall contain,

- (a) a statement that the head intends to release a record or a part of a record that may affect the interests of the person;
- (b) a description of the contents of the record or part that relate to the person; and
- (c) a statement that if the person makes representations forthwith to the head as to why the record or part thereof should not be disclosed, those representations will be considered by the head.

REPRESENTATIONS

(4) A person who is given notice under subsection (2) may make representations forthwith to the head concerning why the record or part should not be disclosed.







- These duties and responsibilities belong to the head alone. Therefore, submissions on an appeal as to the applicability of this section cannot be delegated to anyone other than the head. (**Orders #65, 187, P-293, P-482, M-401**)
- In this case, this section did not to apply to the disclosure of drug quality advisory body minutes. (**Order #68**)







## EXEMPTIONS

FIPPA

MFIPPA

s.12

CABINET RECORDS

No comparable section

(1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters



relating to the making of government decisions or the formulation of government policy;

- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
- (f) draft legislation or regulations.

#### EXCEPTION

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

- (a) the record is more than twenty years old; or
- (b) the Executive Council for which, or in respect of which, the record has been prepared consents of access being given.



## Introductory Words

- The introductory words of s.12(1) provide broader criteria than s.12(1)(a) to (f). Therefore, if a record does not fall within s.12(1)(a) to (f) it may still fall within the introductory words of s.12(1). (**Orders #22, 40, 56, 72, 73, 131, 147, 205, 206, P-226, P-278, P-293, P-304, P-331, P-361, P-376, P-424, P-503, P-529, P-604, P-641, P-654, P-664**)
- The exemption is applicable to records associated with the normal Cabinet decision-making process. In this case, a funding request was sent from an outside Council directly to a Cabinet Committee. The Commission ruled that the record was not the type of record which was intended to qualify for exemption under this provision. (**Order #80**)
- *It is possible for records that have never been placed before an Executive Council or its Committees to qualify for exemption under the introductory wording of s.12(1). This may occur where a ministry establishes that disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees or where release would permit the drawing of accurate inferences regarding the substance of the deliberations. For example, reports that had been reviewed by Ministers and were incorporated into submissions made at Cabinet Committees and to Cabinet would permit the drawing of accurate inferences regarding the substance of deliberations of the Executive Council or its Committees. The reports were therefore exempt. (Orders #72, 73, 147, 167, P-226, P-293, P-331, P-361, P-376, P-424, P-483, P-529, P-604, P-641, P-654, P-771)*
- Where the relationship between the record and a possible future Cabinet submission is too remote, the exemption does not apply. In this case, a policy paper that was tentatively scheduled for a Deputy Minister's Committee was not exempt under this section because it was only to go to Cabinet if it was adopted by the Committee and its adoption was uncertain. (**Order #P-424**)
- The term "substance" means the essential aspect or most important part of the deliberations. (**Orders #72, 167**)
- A document entitled "Contentious Issue," designed to provide a script for a response in the event that a particular issue was raised by the media, is not exempt under this section. Even though this record was prepared to brief a Minister of the Crown in relation to a matter that was before the Executive Council, it would not reveal the substance of the deliberations of the Executive Council or fall within any of the subsections of the exemptions. (**Order #P-508**)
- A record that primarily relates to procedural matters pertaining to the institution's attempts to obtain final Cabinet approval, does not reveal the substance of Cabinet deliberations. (**Order #P-627**)



- Minutes of meetings held by an advisory body formed to propose amendments to a statute were not exempt under this provision. The Commission found that the contents of the minutes would not permit the requester to draw accurate inferences about the nature of Cabinet deliberations regarding the proposed amendments. The minutes were prepared some 3 to 5 years before Cabinet deliberated on the amendments and the connection between them and the deliberations was too remote. (**Order #P-812**)

**s.12(1)**

- The term "deliberation" means the process of deliberating regarding a contemplated act. (**Orders #72, 167**)
- The institution must provide objective evidence to establish that the records went before Cabinet or its Committees or that they were incorporated into a Cabinet submission or used as a basis for developing a Cabinet submission. (**Order #167**)
- If the record was created as a direct result of a Cabinet Committee's request for the specific information contained in the report, it would fall within this subsection. (**Orders #72, 206**)
- In this case, the exemption was held to apply to parts of a briefing note that referred to a proposal discussed at a Cabinet meeting and to matters contained in a Cabinet submission. Disclosure would permit the drawing of inferences about the deliberations of Cabinet. However, where a memorandum does not by inference or in itself reveal the "substance" of deliberations of the Executive Council, it is not exempt. (**Order #P-483**)
- A briefing note that commented on a Cabinet submission was exempt under this section. The briefing note contained detailed information regarding the subject of the Cabinet submission, much of which was extracted from the submission. Disclosure in this case would be tantamount to disclosing the substance of the deliberations of a Cabinet Committee. (**Order #P-503**)
- In this case, a record containing a Deputy Minister's comment on a first draft of a Cabinet submission was not exempt under this section or subsections (a) through (e). The letter was written from one Deputy Minister to another and indicated that the Deputy had no concerns. The institution had not provided any representations as to why the exemption applied and it was not apparent from a review of the record that it was exempt under this section. (**Order #P-503**)
- The mere reference to a Cabinet submission without any description of its contents does not bring a document within the ambit of this exemption. (**Order #P-529**)
- It is unfair to preclude an institution from relying on a mandatory exemption for records that have been released without its knowledge. (**Order #P-901**)



**s.12(1)(a)**

- This exemption does not extend to the individual ministerial level. The record must have been reflective of the deliberations or decisions of the Executive Council or its Committees. **(Order #131)**
- Once legislation is proclaimed it is made public and cannot be subject to this exemption. **(Order #P-278)**
- In this case the agenda of a sub-committee of a Cabinet Committee was not exempt under this provision. In order for the body to be a "Committee" for the purpose of this section, it must be composed of Ministers where some tradition of collective ministerial responsibility and Cabinet prerogative may be invoked to justify the application of the exemption. **(Order #P-604)**

**s.12(1)(b)**

- To qualify for this exemption, the records must contain specific policy options or recommendations. To come within s.12(1)(b), there must be evidence that the record went before Cabinet or its Committees or that it was incorporated into a Cabinet submission or used as a basis for developing a Cabinet submission. References to proposals put before a court-appointed receiver in the course of bankruptcy proceedings do not qualify where there is no discussion as to how this relates to government policy or any reference to recommended courses of action. Records, which are prepared to update members of the Executive Council on the status of matters, are not exempt under this provision. **(Order #P-323, #47, 206, P-323, P-604 P-726,, P-772)**
- Where a record is exempt under this provision, it is irrelevant that the contents of the record have been summarized in a publication or that the author of the record has been provided with access to the record. **(Order #P-334)**
- Section 12(1)(b) does not include records containing numerical data in columns, matrices and calculations. These records did not contain policy options or recommendations. While it could be argued that the titles of the impact studies and their column headings alone reflect some of the options available for consideration, this information is not by itself sufficient to satisfy this provision. **(Order #60)**
- Section 12(1)(b) does not include findings or recommendations in a report referred to briefly in an executive summary, which led to the creation of another record prepared for submission to Cabinet. The record must contain policy options or recommendations and the record must have been submitted or prepared for submission to the Executive Council or its Committees. **(Orders #73, P-323, P-424, P-503, P-654)**
- A covering memo attached to a Cabinet submission is a transmittal document by which the



submission is provided to a number of ministries. The memo in this case did not contain policy options or recommendations. The document was not submitted or prepared for submission to an Executive Council or one of its Committees. As a result, this exemption did not apply. (**Order #P-503**)

- Cabinet documents containing previously approved policies may still contain "policy options" and/or "recommendations" as noted in this section. (**Order #P-987**)

**s.12(1)(c)**

- Section 12(1)(c) does not apply once the government has made the records in question public by disclosure in the Budget Speech and by a ministerial announcement that a decision has been made and implemented. (**Orders #60, 206, P-323**)
- In order for the exemption to apply, a briefing note that contains background analyses must also have been submitted or prepared for submission to the Executive Council or its Committees for its consideration. (**Orders #188, P-664, P-726**)

**s.12(c) and (e)**

- These provisions are prospective and not intended to apply to decisions that have been made and implemented. The fact that the issues may be revisited is insufficient to engage these exemptions. (**Orders #60, 73, P-323, P-604**)
- To qualify for exemption, the actual record at issue must have been submitted or prepared for submission to Cabinet or a Cabinet committee. It is not sufficient that the issues addressed in the record were submitted to Cabinet for its consideration. (**Order #P-920**)

**s.12(1)(d)**

- This provision does not apply to records in respect of government policy that had already been formulated and implemented. (**Order #P-304**)
- Where the records were not used but were intended to be used for consultations among Ministers of the Crown, this provision is not satisfied. This provision requires that the record was actually used for or reflects actual consultation among Ministers of the Crown on matters relating to the making of government decisions, or the formulation of government policy. (**Orders #206, P-304, P-604**)
- This provision may be used to exempt letters from a Minister to the Attorney General regarding the making of government decisions. (**Orders #56, 134**)
- In this case, a consultant's report that showed the results of a number of public focus group sessions dealing with the prospect of legalized gambling in Ontario was exempt under this



section. The report was commissioned by the ministry, considered by the Minister, used as the basis for a cabinet submission and reviewed by a Cabinet Committee. (**Order #P-514**)

- To qualify under this exemption a record must 1) reflect consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy, or 2) the record was used to make government decisions or the formulation of government policy.) (**Order #P-883**)
- To be exempt, there must be evidence that the record was used for consultations among **ministers**. The exemption does not apply if the record was used for consultations among civil servants employed in ministries. (**Order #P-920**)

#### s.12(1)(e)

- In order for this exemption to succeed, there must be evidence that all aspects of s.12(1)(e) have been satisfied. (**Order #167**)
- An issues sheet prepared for a minister was exempt under this provision. (**Order #56**)
- Section 12(1)(e) does not include records already presented to and dealt with by the Executive Council or its Committees. (**Orders #22, 60, 167, P-323**)
- A covering memo to a Cabinet submission was not exempt under this section. The memo was not prepared to brief a Minister; it was circulated among Deputy Ministers only and it did not comment substantively on the Cabinet submission. (**Order #P-503**)
- To qualify under this exemption an institution must establish that the record itself has been prepared to brief a minister of the Crown in relation to matters that are either: 1) before or proposed to be brought before the Executive Council or its committees; or 2) the subject of consultations among ministers relating to government decisions or the formulation of government policy. A record that consists only of a series of one-line references to the titles of issues sheets, which themselves were prepared to brief the Minister, does not fall within the exemption in s.12(1)(e). (**Orders #131, 167, 206, P-503 P-883**)
- This exemption applied where, even though the formulation of government policy to transfer the Psychiatric Patients Advocacy Office to the Ministry of Citizenship had been completed, particular issues regarding the actual transfer were still outstanding. (**Order #P-891**)
- Where Ontario Hydro had provided an unsolicited document of a Provincial Nuclear Emergency Plan to the Solicitor General, the exemption did not apply. Briefing materials should be restricted to documents prepared or assembled by ministry staff for consideration by their minister or a fellow Cabinet member. Materials provided to a minister by a third party fall outside the scope of this exemption. (**Order #P-901**)



- This provision is prospective, or at least meant to cover issues that are presently the subject of interministerial consultations or currently before the Executive Council or its committees. The fact that these issues may be revisited is insufficient to substantiate a claim for exemption under this provision. (See Order 40) (**Order #P-946, P-40**)

**s.12(2)(b)**

- Where draft legislation is circulated to certain groups or individuals during a consultation process, the institution, in response to an access request for the draft legislation, should not only consider seeking the consent of the Executive Council when claiming this exemption, it should ask the Executive Council for its consent. Among the relevant considerations relevant to the release of a draft regulation that was circulated to various interest groups for comment are: 1. the fact that the draft regulation has already been widely distributed; 2. the fact that the draft regulation is stamped confidential 'until filed with the Registrar of Regulations;' and 3. that the regulation had already been enacted when the request was responded to. (**Orders #P-278, P-771**)
- Section 12(2)(b) does not impose a requirement on the head to seek consent of Cabinet in response to an access request in all cases. The head must direct his or her mind to whether consent should be sought. Where a decision is made to seek such consent, the head should also indicate whether he or she believes that such consent should be forthcoming based on the facts of the case. (**Orders #22, 24, 40, 72, 154, 160, P-278, P-771**)
- The institution must establish by evidence that the head had considered the possibility of seeking the consent of the Executive Council for the release of the records. (**Order #72**)



**FIPPA**

No comparable section

**MFIPPA**

**DRAFT BY-LAWS, ETC. s.6**

(1) A head may refuse to disclose a record,

- (a) that contains a draft of a by-law or a draft of a private bill; or
- (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

**EXCEPTION**

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

- (a) in the case of a record under clause (1)(a), the draft has been considered in a meeting open to the public;
- (b) in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public; or
- (c) the record is more than twenty years old.







## s.6(1)(a)

- This provision is not broad enough to include records that are about a draft by-law but are not the draft by-law itself. The language in this provision is different than that used in s.6(1)(b); that is, the word "reveal" is not used. Under s.6(1)(b) records from which an accurate inference may be drawn would be included in the exemption. Therefore, the Commission held that this exemption only applies to records which actually contain the draft by-law. (**Order #M-394**)

## s.6(1)(b)

- In order to qualify for this exemption, it must be established that a meeting of a council, board, or other body or committee of one of them took place, that a meeting was held in the absence of the public and that a statute authorizes the holding of the meeting in the absence of the public and that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting. Section 55 of the Municipal Act authorizes the committee of the whole to exclude the public from its meetings. (**Order #M-64, M-71, M-98, M-102, M-184, M-196, M-206, M-208, M-219, M-241, M-273, M-310, M-318, M-330, M-367**)
- To satisfy this exemption it is necessary that the institution establish that a meeting took place and that it was held in the absence of the public. These meetings are such a departure from the norm, that there must be clear and tangible evidence that the meeting or parts of the meeting were actually held in camera. The fact that the agenda of a meeting indicated that certain matters were "private" does not mean that they were dealt with in the absence of the public. As well, the fact that the records were stamped "in camera" is not sufficient to establish the fact that the matters were dealt with in the absence of the public. (**Orders #M-102, M-241, M-367**)
- Even where the information contained in the record has been the subject of the deliberations, unless the record itself contains information that would reveal the substance of the deliberations, the exemption does not apply. As a result, the exemption is limited in its application to those records that would disclose the **substance of the deliberations** of a closed meeting. (**Orders #M-98, M-206, M-208, M-353, M-385**)
- Section 55(1) of the Municipal Act clearly excludes meetings of a committee of the whole from the requirements that meetings be conducted in public and therefore authorizes the holding of meetings in the absence of the public. In this case, a comparison of the in camera records showed that deliberations had in fact taken place and that the exemption therefore



applied. (Order #M-208)

- Records concerning a discussion of personal or financial information of an employee of an institution is exempt under this section where they reflect the minutes of an "in camera" meeting. The institution was authorized to hold the private meeting under s.207(2) of the Education Act. (Orders #M-47, M-273)
- Minutes of settlement regarding negotiations about an outstanding grievance arbitration with an employee of a board was exempt under this provision. The minutes were approved by the committee of the Whole Board during an in camera meeting. Clauses 207(2)(b), (d) and (e) of the Education Act allows in camera meetings regarding personal or financial information of a board member, negotiations regarding employees of the board and litigation affecting the board. The term "substance" means the theme or subject of the meeting. The word "deliberations" refers to discussions that were conducted with a view toward making a decision. In this case, disclosure of the document would reveal the actual substance of the discussions (i.e.: deliberations) conducted by the board, or would permit the drawing of accurate inferences about the substance of the discussions. (Orders #M-184, M-196, M-206, M-241, M-310, M-330, M-353, M-355, M-367)
- A retirement settlement agreement between a City and its former employee was not accessible in this case because the City had discussed the matter in a private meeting and the disclosure would reveal the "substance" of the deliberations. As a result, the City could, in its discretion, apply this exemption to the agreement. This information was not considered in a public meeting, so that s.6(2)(b) did not apply. In a "postscript," the Commission noted that it would be unfortunate if "institutions began to use this provision to routinely shield the financial terms of such agreements from legitimate public scrutiny." This was reiterated in M-367 which dealt with a separation agreement entered into by a Police Service Board and a former Chief of Police. (Orders #M-196, M-330, M-367 and see M-173 under the personal information exemption for another example of disclosure involving retirement settlement agreements.)
- In this case, the Commission found that a procedural by-law and s.55(1) of the Municipal Act authorized the holding of an in camera Committee meeting in respect of a matter that could become the subject of litigation. As well, upon production of a copy of the minutes of the meeting which indicated that the matter was discussed in camera, the Commission was satisfied that the in camera test was met. (Order #M-219)
- In this case, the Commission ordered the institution to provide further representations as to its exercise of discretion where the records dealt with in the closed meeting had been published in the newspaper. The Commission ruled that the fact of publication was a fundamental factor to be considered in the exercise of discretion and it was not apparent that the institution had considered this factor in claiming the exemption. (Order #M-273)



- There must be clear and tangible evidence that the meeting was held in the absence of the public. Where the council decided to allow a member of the public to be present at a meeting, then the institution could not argue that the meeting was nevertheless one that was closed to the public. (**Order #M-318**)
- Section 35(4) of the Police Services Act provided the authority for a Police Services Board to hold meetings in camera regarding whether an individual ought to be hired by the Police Services Board. (**Orders #M-355, M-367, M-380**)

**s.6(2)(b)**

- In this case, in camera approval of Minutes of Settlement were subsequently confirmed by public motion without further comment. As a result, the subject matter of the deliberations was not considered in an open meeting and this exception to the exemption did not apply. (**Order #M-184**)
- In this case, a consolidated budget which was deliberated in an in camera meeting was formally adopted by council at a public meeting. In order for this exception to the exemption to apply, it must be established that the line items in the budget were considered in the public meeting. In other words, it is not sufficient that the product of, the deliberations be considered in the open meeting; it is necessary that the subject matter of the deliberations, which here would be the line items, be considered in the open meeting. (**Orders #M-208, M-353**)
- The adoption of a report, without discussion in a public meeting, cannot be characterized as the consideration of the subject matter of the in camera deliberations as contemplated by section 6(2)(b) of the Act. As a result, where in a public meeting, a recorded vote was taken in which the City Council adopted the Executive Committee Report, as amended, without further discussion, this exception did not apply. (**Orders #M-241, M-385, M-392**)
- The mere disclosure or reporting of a decision made at an in camera meeting, does not necessarily mean that all issues discussed at such meeting fall within the "subject matter of the deliberations" to trigger this exception to the exemption. A distinction has to be made between the product or the results of the deliberations and the subject matter. Thus where 'requests' were made in an in camera meeting and reported in public session, this provision did not apply. (**Order #M-353**)
- Where a hiring decision was discussed in a closed meeting and where nothing more referable to the discussion was done in an open meeting, the exemption still applied. In this case, there was no relationship between what was said in the open meeting and the discussions about the hiring decision that took place in camera. (**Order #M-355**)







(1) A head may refuse to disclose a record where (FIPPA)/if (MFIPPA) the disclosure would reveal advice or recommendations of

a public servant, any other person employed in the service of an institution

an officer or employee of an institution

or a consultant retained by an institution.

#### EXCEPTION

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(a) factual material;

(b) a statistical survey;

(b) a statistical survey;

(c) a report by a valuator, whether or not the valuator is an officer of the institution;

(c) a report by a valuator;

(d) an environmental impact statement or similar record;

(d) an environmental impact statement or similar record;

(e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(e) a report or study on the performance or efficiency of an institution;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;



(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

(g) a report containing the results of field research undertaken before the formulation of a policy proposal;

(h) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program;

(i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;

(j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution



(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

**IDEM**

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where (FIPPA)/if (MFIPPA) the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.







ss.(1)

## General

- "Advice" or "recommendations" must contain more than mere information. Advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected during the deliberative process. The deliberative process does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the institution (see P-434 and M-396). (Orders #118, 135, 142, 160, 163, 164, 167, 204, 206, 210, P-211, P-233, P-248, P-285, P-288, P-298, P-304, P-320, P-348, P-363, M-40, M-61, M-69, P-398, P-402, P-416, M-102, P-434, P-440, P-441, P-442, M-120, P-449, P-452, P-454, P-463, P-468, P-484, P-487, P-480, P-477, P-492, P-493, P-506, P-508, P-506, P-529, M-194, P-541, P-547, P-551, P-583, P-603, P-576, P-585, P-593, P-597, P-598, M-210, M-212, P-627, P-628, M-265, P-635, P-641, M-280, P-643, M-282, M-287, P-664, P-666, P-658, M-295, M-296, M-315, P-677, P-686, P-701, M-328, P-702, P-710, M-342, P-726, P-752, P-763, P-771, M-394, M-396, P-783, P-775, P-803, P-811, P-790, P-807, P-809, P-811, P-816, P-820, P-827)
- This exemption is not intended to exempt all communications between public servants even if they can be seen broadly as advice or recommendations. The exemption protects the free flow of advice and recommendations within the deliberative process of government decision making and policy making. (Orders #94, 118, 135, 141, 142, 147, 160, 163, 165, 167, 168, 201, 204, 206, 210, P-211, P-248, P-270, P-278, P-348, M-40, M-83, P-417, M-102, P-434)
- The head must consider ss.(2) before exercising his or her discretion in respect of this exemption. (Orders #56, 92).
- This exemption applies to records that if released would inhibit the free flow of advice and recommendations within the deliberative process of government decision making and policy making. As result, handwritten notes made by the director of planning after conferring with a superintendent regarding the subject of an Ontario Municipal Board hearing were not exempt under this provision. This was also true of two zoning analyses and a chronological record of communications between the Town and other persons involved in the hearing. (Order #M-83)
- A record disclosing "concerns" of a civil servant does not constitute "advice or recommendations." The reference to a "concern" does not suggest a course of action, which can be accepted or rejected during the deliberative process. (Order #160)
- Discussions in records that state that it "may be of interest to ..." is not advice or



recommendations, but "mere reportage." There is no specific course of action offered for deliberation leading to a decision. (**Order #201**)

- Comments about the merits of a proposed project and the alternatives available should the government decide to support the proposal constitute opinion or factual material and do not suggest a recommended course of action. The record is therefore not exempt under this section. (**Order #P-493**)
- This exemption may not include a ministerial transmittal slip with references to the fact that advice was given where the advice is not appended, or where the particular record containing the advice is not specifically referred to. A telephone message slip is not included where only the topic of the conversation is noted. "Advice" must include communication from one person to another. Therefore, a memo to yourself or a "work plan" that is not communicated to another person is not advice. However, records that identify policy options or models, though not addressed to a particular individual, are exempt where they are clearly prepared by public servants to provide advice to senior-level decision makers. (**Orders #24, 48, 58, 92, 94, 128**)
- For a record to fall within the scope of this exemption, it must reflect a communication. This exemption may apply where it is evident that the records were prepared by public servants to provide advice to decision makers and policy makers within the institution, even though they are not addressed to a particular individual. As a result, the records in this case did contain communications that were covered by this exemption. (**Orders #P-522, 128, 94, 58, P-551**)
- A record may be exempt if it would reveal advice or recommendations by **inference** even though it is not itself advisory in nature. (**Orders #P-233, M-280**)
- This exemption is not time-limited. A record may continue to be exempt under this exemption, even though an institution may have completed its decision-making on a matter. However, the fact that a decision on the subject-matter of the advice has been made is one of the factors that the head should consider in exercising his or her discretion to disclose the record. (**Order #P-920**)
- An assessment of a recommendation proposed in a strategy paper constitutes advice and recommendations in that it essentially sets out the advantages of such an approach and provides the rationale for the recommendation. (**Order #P-946, P-529**)

### Severances

- Where factual information is so interwoven with the advice and recommendations that it cannot reasonably be severed, then the exemption may apply to the document in its entirety. (**Orders #24, 48, 92, 160, P-278, P-356, M-69**)



- Where only two sentences of a record contain advice, they may be severed from the factual material contained in the rest of the record. In this case, the factual material was not so interwoven with the advice that it required the whole record to be exempt. (**Order #P-416**)

## **Drafts**

- Where a public servant provides advice as to the position the institution should take in a draft decision, that advice may be exempt under this provision. (**Order #P-320**)
- A draft document may be exempt if the institution can establish that the draft contains a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process. A draft form may be exempt in its entirety under this section where it can be shown that its contents would be accepted or rejected during the deliberative process (**P-324**). (**Orders #92, 188, P-278, P-324, P-827**)
- A draft affidavit containing the outline of certain facts prepared by one employee for another's consideration is not exempt under this section. (**Order #P-398**)
- Drafts are not by their very nature recommendations. Recommendations are suggested courses of action that will ultimately be accepted or rejected during the deliberative process. In these cases, the draft letter of engagement and the draft memorandum were not exempt under this section. (**Orders #P-434, P-480, P-493**)
- In this case, the draft interim report, prepared to advise a Deputy Minister of the initial audit findings regarding a local organization, was not exempt under this provision. While the Commission was satisfied that the draft report was circulated for comments and discussion and that portions of it would ultimately be incorporated into a final report, it ruled that the exemption did not apply because no advice or recommendation was provided which sets forth an approach that may be adopted by the recipient of the report. (**Order #P-547**)
- Draft letters with handwritten notes in the margins were not exempt under this provision. The Commission ruled that the submissions of the institution were not sufficient to show that the record contained a suggested course of action, which would be accepted or rejected in the deliberative process. (**Order #P-551**) However, see also reference to draft letters for Minister's signature re: Order #92 below.
- In this case, a draft letter that did not contain advice or recommendations was not exempt under this provision. (**Order #P-666**)

## **Issues Sheets \ Briefing Notes**

- This exemption includes the "response" sections of the Minister's issue notes. These contain advice from a public servant to the Minister as to how to respond. As well, draft



letters for the Minister's signature are "advice." (**Orders #92, 188, P-278, P-508**)

- The "topic" and "background" sections of the briefing response (Minister's issue notes) do not contain advice and recommendations. (**Order #188**)
- In this case, the "Suggested Responses" prepared for the Minister did not fall under this exemption because the suggested responses simply described decisions that the ministry had already made. (**Order #P-529**)
- The "Suggested Response" section of an issue note prepared for a senior government official may be exempt under this section where it contains a suggested course of action, which may be accepted or rejected in the course of deliberations. Similarly, the "Response" sections of an issues sheet may be exempt under this section. (**Orders P-508, P-514, P-771**)
- Information does not become advice or recommendations merely because the record is entitled "Confidential Advice to the Minister." The information itself must satisfy the objective criteria. (**Order #P-442**)
- A memorandum from an assistant deputy minister to a minister regarding the wording of a regulation was held to not be exempt under this provision. The Commission found that the memorandum was provided to the minister for her signature and that the wording of the regulation had already been approved by Cabinet. As a result, the record did not disclose a suggested course of action; rather, it was a formal transmittal memorandum that was purely factual in nature. (**Order #P-803**)

## Options

- A record that identifies an **option** is not exempt under this section where it does not contain any wording which would indicate whether the option is recommended or not. (**Order #P-398**)
- Options that are listed for consideration are not exempt in and of themselves unless they represent a recommended option. (**Order #P-658**)
- The information under each option, ie. the possible advantages and disadvantages of each option (excluding the headings) and the option favoured by the ministry staff, constituted the advice and recommendations, respectively. This order reiterates previous order P-529 (**Order #P-922**)

## The Following Are Exempt Under the Advice and Recommendations Exemption:

- Recommendations regarding a suggested course of action in relation to civil litigation were exempt under this section in this case. (**Order #P-484**)



- The advice and recommendations of a drug advisory body, created to assist a Minister, are included in this section. "Advice and recommendations" includes records of discussions, comments and recommendations by the advisory body. (**Orders #68, 128**)
- An account of advice, which the writer of the memorandum had previously received from investigating officers, is exempt under this section. (**Order #170**)
- In this case, this exemption was held to apply to records created by a consultant concerning an internal workplace investigation into an alleged assault. The consultant's report contained recommendations as to steps to take regarding the incident. (**Order #M-120**)
- Comments offered by a consultant researcher regarding another researcher's work that identify areas of potential research are advisory. The comments of the researcher regarding other researchers' suitability are also advice. This is also true of marginal notes made by the consultant. (**Orders #P-454, P-463**)
- The investigator's advice and recommendations regarding whether a sexual harassment investigation should proceed to the follow-up stage are exempt under this section. The findings of the investigators, however, are not "advice or recommendations" under this section. (**Order #165**)
- Advice from a lawyer who is employed or retained by an institution may be exempt under this section (e.g., legal analysis, assessment of facts). (**Order #170**)
- Correspondence and a draft investigation report prepared by an institution's human rights investigator which contained detailed recommendations as to a specific course of action to be taken by the institution were exempt. (**Order #M-523**)
- The exemption applied to proposed action plans for community education and development developed by a Ministry in response to a particular issue and to documents containing proposed responses to certain questions. These records contained suggested courses of action which could be accepted or rejected in the deliberative process. (**Order #P-978**)

The Following Are Not Exempt Under the Advice and Recommendations Exemption:

(a) General

- This exemption does not include a record that merely identifies a policy. (**Order #56**)
- An employee's review of a tribunal's decision to determine whether it qualifies in law for appeal is not advice. This is factual information as to why an appeal should be considered. (**Order #201**)



- The disclosure of the name of the public servant would not amount to disclosure of "advice or recommendations"; s.13(1) [FIPPA] \ s.7 [MFIPPA] does not in effect create anonymous public servants. (**Order #172**)
- A record of a public servant who seeks advice is not exempt. As well, a record that refers to two options without outlining the options is not exempt. (**Order #P-233**)
- It is not possible to protect public information from disclosure under this exemption. For example, a provincial auditor's report would be disclosed. (**Order #48**)
- The identity of a company most likely to be chosen to operate certain transportation corridors is not exempt under this provision. As well, the ranking of various proposals submitted by particular bus service operators is not exempt as advice or recommendations. (**Order #P-529**)
- Minutes of meetings containing statements by individual members approving of previously suggested plans, or speculating as to possible courses of action which might be recommended by the committee were not 'advice or recommendations' under this provision. (**Orders #P-628, M-315**)
- A review report that contained a description of the purpose of the review, how the investigation was conducted, various issues identified during the course of the investigation, summaries of information received from the individuals who were interviewed, supporting documentation, etc. was not a suggested course of action in its entirety. Each part of the report had to be reviewed to determine whether it was exempt under this provision. Options that are listed for consideration are not exempt in and of themselves unless they represent a recommended option. (**Order #P-658**)
- Comments, questions, remarks and exchanges of ideas were held to be a collective effort by individuals to achieve a common goal and not "advice" or "recommendations." The information was not organized in such a manner as to constitute "advice" or "recommendations" and there was no action plan or formalized manner of proceeding. (**Order #M-394**)
- The recommendations of the Advisory Review Board, the Lieutenant Governor's Board of Review and the Ontario Criminal Code Review Board may be characterized as decisions rather than as advice or recommendations within the meaning of this provision. The Commission applied the Ontario Court of Appeal's decision in Re Able and Advisory Review Board (1980), 31 O.R. (2d) 520, which held that the recommendations made to the Lieutenant Governor in these instances were tantamount to decisions. (**Orders #P-775, P-820**)



- A record that contains recommendations as to technical specifications necessary to build a scoreboard is not subject to this exemption. The disclosure of such a record would not reasonably be expected to inhibit the free flow of information to decision makers. (**Order #204**)
- Records containing background information used in the preparation of a response by a Minister to a complaint from a member of the public do not constitute "advice or recommendations." The correspondence contained factual information about questions raised by the individual in his complaint to the Minister and do not contain a suggested course of action. (**Order P-585**)
- Factual material, discussions of methodology, analyses and preliminary findings, and charts and statistics do not constitute advice or recommendations under this provision. (**Order #P-726**)
- An internal transfer memo indicating the reasons for referring an Ontario Human Rights Commission complaint matter to a task force team was not subject to this exemption. Though it reflected the recommendations of staff that were accepted, it was placed in the file when the decision had already been made and thus the memo was purely factual in nature. However, a Case Disposition sheet containing the advice of the investigating officer with respect to whether or not the evidence warrants the appointment of a board of inquiry was exempt under this provision. (**Order #P-816**)
- A procedural manual to be used by wildlife custodians during the course of their treatment of wild animals within a statutory framework was not exempt under this provision. As well, a policy paper which contained policy options was not exempt where the options did not, in addition, contain a recommended course of action. (**Order #P-811**)
- The "outcome" and "implications" sections of a record that outlined the initiatives and policies that an institution put in place in relation to a particular situation did not reveal advice or recommendations. Rather, the sections focused on steps that may be taken by the institution to ensure that the initiatives and policies were complied with. (**Order #P-790**)
- The exemption did not apply to advice provided by an employee of the Ontario Human Rights Commission to an outside body such as a party to a human rights complaint. (**Order #P-848**)
- Even though portions of a report on the operations of a crisis centre may contain gossip, innuendo, rumour and factual inaccuracies, such information even though inaccurate or unreliable, was not "advice and recommendations" under this exemption. (**Order #P-872**)
- A section of a memo titled "Questions and Answers" was not exempt because it did not contain information relating to a course of action that could be accepted or rejected as part of policy development. (**Order #P-920**)



- A memo from the Acting Deputy Attorney General to the Deputy Treasurer which contained the author's opinion of a proposal but which neither provides advice nor suggests any recommendations to operationalize the opinion within the deliberative process of government decision or policy making was not exempt. (**Order #P-920**)
- "Concerns" do not qualify as advice or recommendations - expression of concern about a statement in an investigative report which also asks that the report be amended does not qualify as "advice or recommendations". Similarly, a response describing the amendment made to the report is also not covered by this exemption. (**Order #M-523**)
- Opinion or factual material which does not reveal a recommended course of action is not covered by this exemption. (**Order #M-523**)
- A letter exchanged between 2 managers in an institution which clarifies the role of an investigator into a complaint FO discrimination did not contain "advice or recommendations". (**Order #M-523**)

(b) Human Resources

- Human resource matters have no relation to the actual business of an institution. To apply this exemption to those matters would extend it beyond its purpose and intent. As a result, the Commission found that any recommendations or advice contained in an investigation report of allegations of sexual harassment were not exempt. (**Order #M-396**)
- This exemption does not extend to communications between public servants that relate exclusively to human resource matters. Human resource matters have no relation to the actual business of the institution. In this particular case, recommendations regarding the promotion of an employee were therefore not exempt under this section. (**Order #P-434. Note above, Order #165 where recommendations made in an internal Workplace Discrimination and Harassment investigation were covered by this exemption.**)
- A record dealing with what two individuals' salaries will be is not part of the deliberative process of government decision making or policy making; rather, it is a routine decision about an employee or group of employees. Such a decision does not involve policy considerations or the consideration of alternative courses of action. As a result, this exemption does not apply. (**Orders #M-102, P-434, M-396**)
- A memo addressing the impact of the social contract on the remuneration of senior officials in an institution is not a typical human resources matter because the topic involved an entire class of employees as opposed to an individual staff member. Where the memo was directed to the most senior decision-making body in the institution it formed part of the decision or policy making process. The exemption therefore applied. (**Order #M-457**)



### **ss.(1) - Officer, Employee or Consultant Retained**

- The words "retained by" presuppose a formal engagement of professional services by fee. (**Order #P-278**) To determine whether a consultant has been "retained" by an institution, a number of factors must be considered. The payment of a fee is an important indicator in determining whether a formal engagement of services has occurred. In this case, the institution intended to and did retain the services of the consultant researcher, despite the absence of a fee. (**Orders #P-454, P-463**)
- Where a record did not contain the name of the author and the Commission had not been provided with evidence as to whether the author was an officer or employee of the institution or a consultant retained by the institution, the record may not be exempt even if it contained advice and recommendations. (**Order #M-315**)
- Section 13(1) [FIPPA] is limited to records created by consultants or Ontario public servants or others in the employ of institutions covered by the Act. As a result, in **Order #56**, the Commission ruled that recommendations from civil servants in other jurisdictions were not covered by this exemption. However, in **Order 170**, the Commission apparently allowed the exemption to apply to records obtained from the Office of the Ombudsman, which is not an institution under the Act. (**Orders #56, 170** (at page 23))
- Recommendations made by an inter-ministerial committee were found to be exempt. (**Order #P-879**)

### **ss.(2) - General**

- Subsection 2 of this exemption must be considered before a decision is made to use this exemption. The Commissioner can order the head to do this where there is no evidence it was done. (**Orders #56, 92**)
- Records falling within ss.2 are not subject to this exemption in their entirety even where they contain advice and recommendations. (**Orders #P-726, P-763**)

#### **ss.(2)(a)**

- "Factual material" does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separated from the rest of the "advice or recommendations." For example, an appendix of factual information supporting a policy document would be disclosed under this provision. (**Orders #24, 48, 92, 128, 135, 142, 167, P-508**)

#### **s.13(2)(f) [FIPPA] \ comparable to s.7(2)(e) [MFIPPA]**

- A consultant's study that dealt with student satisfaction and programs related to it was



about the performance and efficiency of the institution, a community college. The consultant provided advice as to how these issues might be dealt with. This provision applied even though the study dealt with a part of the institution. The study was disclosed under this provision. (**Orders #P-348, P-603, P-658**)

- In order for this provision to apply, it is not necessary that the report or study be in respect of the institution as a whole; it may be about only part of the institution. As well, audit reports that deal with effectiveness, efficiency and economy are included in the terms "performance or efficiency" as they are used in this provision. The audit report is therefore available to the public. (**Order #P-603**)
- The review of a legal branch of an institution resulted in a "report" in that it consisted of a formal statement or account of the results of the collation and consideration of information. The record also involves the study of a number of issues and concerns. The investigator's advice and recommendations concerning the issues were designed to assist the institution to deal efficiently with the existing and future problems and to improve performance. As a result, none of the information is exempt given this provision. (**Order #P-658**)
- A report on the operation of the Ontario Provincial Parks system that dealt with the performance and efficiency of the parks system was accessible as a result of this provision. While some parts of the report may have dealt with other related topics, the Commission held that the focus of the study was clearly on assessing the adequacy of the parks system as it was structured. (**Order #P-726**)
- A report, involving the study and review of a number of operational and financial matters concerning the security services operated by the ministry at Queen's Park, described the Staff Sergeant's advice and recommendations for dealing with the problems which he identified. These recommendations are aimed at assisting the ministry in the more efficient operation of its Queen's Park Services. The Commission held that the record may properly be characterized as a report on the efficiency of the Ministry's Queen's Park security services and thus falls within this exception. (**Order #P-989**)

**s.13(2)(g) [FIPPA] \ comparable to s.7(2)(f) [MFIPPA]**

- This provision mandates the disclosure of a type of record: a study. Where the main purpose of the record is to advise the institution as to the feasibility or plausibility of various proposals, the record is accessible. (**Order #206**)
- A report of a consulting firm that examined how provincial parks may be organized and recommended a particular model was accessible under this provision. "Feasibility study" was defined as a study of the practicability of a proposed project. The Commission concluded that while portions of the report provided stakeholder comments on the delivery of park services and evaluated competing models, the fundamental object of the study was to consider the feasibility of the design which the consulting firm recommended



and was thus accessible. (**Order #P-726**)

**s.13(2)(f), (g) [FIPPA] \ comparable to s.7(2)(e), (f) [MFIPPA]**

- These provisions are unusual in the context of the Act in that they constitute mandatory exceptions to the application of an exemption for discrete types of documents, namely reports on institutional performance or feasibility studies. Even if the report or study contains advice or recommendations for the purposes of ss.(1), the institution must still disclose the entire document if the record falls into one of the ss.(2) categories. (**Order #P-726**)

**s.13(2)(h) [FIPPA] \ s.7(2)(g) [MFIPPA]**

- A report of an on-site analysis of natural areas in a specific site district, which summarized the results of the evaluation and recommended the areas most suitable for protection in order to capture a representative example of Ontario's landscape, was held to be accessible as a result of this provision. Field research was held to mean a systematic investigation, conducted away from the laboratory and in the natural environment, of the study of materials and sources for the purpose of establishing facts and reaching new conclusions. The Commission therefore found that the report contained the results of field research. (**Order #P-763**)

**s.13(2)(i) [FIPPA] \ comparable to s.7(2)(h) [MFIPPA]**

- This provision includes records revealing a discussion of the proposal, institutional support for it and the intention to seek the ministry's "urgent" approval. (**Order #55**)

**s.13(2)(j) [FIPPA] \ comparable to s.7(2)(i) [MFIPPA]**

- This provision is unusual in that it is a mandatory exception to the application of an exemption for a type of document, a report. Even if the record contains advice and recommendations, the head may not rely on the exemption in respect of the entire record if it is a report as described in this section. (**Orders #168, M-265**)
- In this case, the Commission ruled that a Patrol Audit Report was a "report" under this section. It consisted of a formal statement or account of the results of the collation and consideration of information. The results would not include mere observations or recordings of fact. The definition of "report" under the law enforcement exemption was therefore adopted in respect of this provision. (**Order #M-265**)
- A report under this provision that is prepared within an institution need not be required to be produced. This exception applies even where it is not required to be produced and where the report fell within the ambit of the committee's mandate. If a committee decides to prepare a report, the subject matter of which is within its mandate, then despite the fact that it is neither the committee's final or ultimate report, nor the report the committee was



originally requested to prepare, the exception here applies. However, where a record is essentially 'suggestions' it does not constitute a 'formal statement or account' but is merely an accumulation of information and is therefore not covered by this provision. (**Order #M-265**)

**s.13(2)(l) [FIPPA] \ comparable to s.7(2)(k) [MFIPPA]**

- This provision applies where the board of director's reasons for its final decisions and the advice and recommendations of the committee are in fact one and the same. The final decisions were made during or at the conclusion of the deliberative function. (**Order #201**)

**s.7(2)(f) and (g) [MFIPPA] \ comparable to s.13(2)(g), (h) [FIPPA]**

- A report to the institution from a planning and engineering firm does not contain the results of field research or a feasibility study or other technical study. Various records containing advice did not in aggregate constitute a feasibility study or technical study, which ought to be released. Thus, this exception does not apply. (**Order #M-69**)

**s.13(3)[FIPPA]**

- This exception to the exemption for advice or recommendations applies when portions of a record are disclosed by the institution to the media as the basis for making a decision. (**Order #164**)



(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (f) deprive a person of the right to a fair trial or impartial adjudication;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (j) facilitate the escape from custody of a person who is under lawful detention;
- (k) jeopardize the security of a centre for lawful detention; or
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

(2) A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency



which has the function of enforcing and regulating compliance with a law;

- (b) that is a law enforcement record where [FIPPA] \ if [MFIPPA] the disclosure would constitute an offence under an Act of Parliament;
- (c) that is a law enforcement record where [FIPPA] \ if [MFIPPA] the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
- (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

#### REFUSAL TO CONFIRM OR DENY EXISTENCE OF RECORD

- (3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

#### EXCEPTION

- (4) Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is [FIPPA] \ that is [MFIPPA] authorized to enforce and regulate compliance with a particular statute of Ontario.

- (5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.



## GENERAL

- In order for a record to qualify as a law enforcement record under this exemption, the institution must establish that it has a law enforcement mandate, and that the record is directly related to this mandate. A record that deals with process and procedure, and not with the substance of a complaint is not a law enforcement record under this section. (**Order #P-416**)

## ss.(1)--"Reasonably be Expected to"

- The Ontario Court of Appeal ruled that the harms envisaged in the law enforcement exemption were satisfied where they "could" reasonably be expected to occur if disclosure was made. In this case, police officers were investigating an allegation of criminal activity said to have occurred in 1976 by staff at the Grandview Training School for Girls in Ontario. Charges were ultimately laid in this matter and the court ruled that disclosure of the records in advance of the trial could reasonably be expected to deprive the accused of the right to a fair trial. In these cases, the right to a fair trial, which is a right enshrined in the Charter of Rights and Freedoms, will be the governing principle. The institution's denial of access was upheld by the Ontario Court of Appeal. Given this decision, in instances where records are relevant to allegations of criminal wrongdoing, institutions may deny access to the records pending a decision by law enforcement authorities not to proceed to a prosecution. (**Ian Wilson, the Archivist of Ontario and the Assistant Information and Privacy Commissioner, October 29, 1993, Ontario Court of Appeal**)
- The Ontario Divisional Court held that, in affirming **Order P-534**, the Commission must approach the exemptions in a "sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context." The Court noted that, given the facts of this case, it did not have to decide whether the 'clear and direct linkage' test applied. In the result, disclosure of certain funding information regarding a criminal investigation where trials were ongoing, was disclosed. (**Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Ont. Div. Ct.), P-902, P-948, P-991, P-992**)
- The Commission confirmed that reasonable expectation of harm required that the institution establish a clear and direct linkage between the disclosure of the information and the harm alleged. The Commission approved of the position taken by the Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture) [1989] 1 F.C. 47 at 59-60, where the Court indicated that a "reasonable expectation of probable harm" was required. It also approved of the Federal Court Trial Division's decision in The Information Commissioner of Canada v. The Prime Minister of Canada, unreported, November 19, 1992, where the Court stated that the mere "possibility" of harm was not sufficient. The Court held that descriptions of possible harm, even in substantial detail, are insufficient in themselves. Justice Rothstein stated that:



The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantial the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a Court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged...While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality, would...be more difficult to satisfy.

(Orders #P-534, M-202, P-557, P-597, P-603, M-223, M-240, P-589, P-616, M-258, M-263, M-268, P-805, P-806, P-816, M-432)

- In this case, the Commission ruled that the reasonable expectation of probable harm envisaged by clauses (1)(a), (b), (d) and (g) was not established regarding the disclosure of records concerning an Ontario Securities Commission (OSC) investigation. The Commission noted the OSC did not provide sufficient evidence regarding the harms and that, in addition, the investigation had been completed. (Order #P-548)
- This provision requires that there exist a reasonable expectation of probable harm. The mere possibility of harm is not enough. In order to establish reasonable expectation, the institution must show a clear and direct linkage between the disclosure of the specific information and the harm alleged. (Orders #P-547, 188, P-534, P-537, P-542, P-543, M-199, P-557, M-202, M-268, M-267, P-649, M-302, P-657, P-670, M-315, M-329, P-999)
- The fact that the disclosure of officers' notebooks contained dates when the officers were on duty, which might be relevant to a current investigation into the officer's conduct under the Police Services Act, was not sufficient to establish a "clear and direct linkage" between the disclosure of the information and the alleged harm. There must exist a reasonable expectation of probable harm; the mere possibility of harm is not sufficient. (Order #M-223)
- This exemption, in ss.1(a), applied to records related to enforcement of support orders under the Family Support Plan Act. The records related to an ongoing law enforcement matter and disclosure would interfere with it. Enforcement of support orders does not end until the orders are terminated and there are no arrears owing. When a support order is in default, the director may require the payer to file a financial statement and to appear before the court to explain the default. Individuals who do not appear in court in these circumstances may be arrested. A clear and direct linkage was established between disclosure of enforcement records in the custody of the Family Support Plan Branch and a reasonable expectation of interference with future enforcement efforts. Disclosure of this information could hamper or impede the ministry's effectiveness in carrying out its duties in this regard. Even where an individual is not currently in default, the ministry continues to have the case before it and must retain the ability to take enforcement action, should a violation occur at any time in the future.



**(Order #P-589)**

- Where there is no logical connection between disclosure of information and the harms mentioned in these provisions, the "could be reasonably be expected to" standard is not met. **(Order #P-1006)**
- The Commission confirmed that reasonable expectation of harm required that the Institution establish a connection between the disclosure of the records and the endangerment or threat which is contemplated **(Order #M-610)**.
- The Commission rejected the ministry's view that the "could reasonably be expected to" standard requires only that disclosure could affect fairness of a trial. **(Order #P-1006)**

**ss.(1)**

- The disclosure of Ontario Provincial Police Criminal Intelligence Records relating to police investigations may be refused under this exemption. **(Order #106)**
- The "topic" and "background" section of a Minister's briefing response, in respect of a murder that occurred within a correctional facility, is not exempt under this exemption. No harm could reasonably be expected to result from disclosure. The reasonable expectation must be based on reason and not be fanciful, imaginary or contrived. **(Orders #188, 203, 205, P-211, P-221, P-225, P-316, M-10, M-14, M-15, P-428, M-150, P-534, P-970)**
- The security-related provisions of ss.(1) are not engaged in respect of a record that deals only with the "philosophy" of security. **(Order #205)**

**ss.(1)(a)**

- The use of the word "interfere" contemplates that the particular investigation or law enforcement matter is still ongoing. **(Orders #P-285, P-316, P-403, P-567, M-258, M-302, M-420, M-433)**
- The fact that an investigation is ongoing is not in itself sufficient to satisfy this exemption. The institution bears the onus of providing evidence to substantiate the reasonable likelihood of the expected harms. **(Order #P-221)**
- Where records related to an automobile accident were compiled during a police investigation and where the trial in this matter had yet to be scheduled, this exemption applied. In this case, a warrant for non-appearance had been issued for one of the individuals involved in the accident. Some of the records in this case contained personal information and were subject to the presumed invasion provisions in the personal information exemption. The remainder of the records which did not contain personal information were, in these circumstances, exempt under this exemption. **(Order #P-567)**



- This provision did not apply to notices of non-compliance with property standard by-laws since disclosure would not interfere with law enforcement. (**Order #M-34**)
- This nature of the record and the length of time the investigation has been inactive are factors in determining the applicability of this exemption. (**Order #M-22**)
- The provision applied where an offence under the Police Services Act was prosecuted and where the appeal process provided for in the Act was not completed. (**Order #P-285**)
- Pre-trial disclosure of a Crown brief that contained occurrence reports and statements of witnesses would be covered by this provision. (**Order #P-306**)
- Investigations into complaints under the Ontario Human Rights Code are "law enforcement" matters. Untimely disclosure of records that would identify complainants and respondents and reveal opinions and advice of staff would "interfere with law enforcement matters" and are therefore exempt. (**Orders #89, 178, 208, P-221, P-225, P-258, P-507**)
- The Ontario Human Rights Commission (OHRC) was ordered to share documentary evidence submitted by the parties to a complaint with the parties. While the OHRC submitted that this legislation ought not to be used to change how the OHRC deals with administrative fairness, the Commission ruled that alternate disclosure mechanisms must still conform with the Act. These exemptions are discretionary and, as a result, the institution must exercise its discretion with respect to each record requested. After reviewing the records at issue the Commission noted that the institution had failed to establish a clear and direct linkage between the disclosure and the harms envisaged by this section. The fact that complainants who see these records may change their story was not considered a "probable" harm. (**Orders #P-616, P-816**)
- The disclosure of the contents of wiretap authorization records could reasonably be expected to "interfere with a law enforcement matter" or with an "investigation." (The Commission has since ruled in **Orders #P-344, P-368, P-378** that wiretap records are outside of the scope of Ontario's access and privacy legislation.) (**Orders #195, P-254**)
- Disclosure of records dealing with the statements of witnesses regarding the actions of members of the Ontario Provincial Police Tactical Response Unit (TRU Team), who were found guilty of Neglect of Duty under the Code of Offences contained in the Police Services Act, Regulation 927, are exempt under this provision. The officers may appeal the penalty or sanction imposed to the Ontario Civilian Commission on Police Services. Under s.63(2) of the Police Services Act, the Commission may receive additional evidence. The Commission may confirm, alter or revoke the decision or may require a re-hearing of the matter. Because a hearing could be commenced where fresh evidence may be provided, the disclosure of the records should be delayed until the time for appeal has elapsed. (**Order #P-482**)
- Disclosure of records to a party with an interest in an investigation must be viewed as



disclosure to the public generally. Premature and unlimited access by the public to information about an ongoing Ontario Human Rights Commission investigation could interfere with the investigation. (**Order #178, P-507**)

- The solicitor for a municipality that was the subject of a complaint to the Ontario Human Rights Commission was not entitled to access records of the ongoing investigation. Disclosure under Ontario's freedom of information and privacy legislation is tantamount to disclosure to the public at large. Even though the municipality would not use the information to interfere with witnesses or influence the direction of the investigation, this provision applied and access was denied. (**Order #P-507**)
- Where a case was before the courts, the police were able to provide sufficient evidence to establish that disclosure of the records could reasonably be expected to interfere with a law enforcement matter. Thus where a criminal matter had not come to trial, this exemption would apply. (**Order #M-450**)
- The Police bear the onus of providing sufficient evidence to establish the reasonableness of the expected harm. The police discharged the onus by providing sufficient evidence that premature disclosure of the vehicle accident report prior to a trial could reasonably interfere with the preparation of the trial. (**Order #M-527**)
- A social assistance eligibility review officer's report relating to the requester and the requester's client history sheet were exempt. Investigations by eligibility review officers qualify as law enforcement matters, and the records were created or compiled as a result of the investigation which was undertaken with a view to law enforcement proceedings. In this case, the matter was scheduled for a hearing before the Social Assistance Review Board and criminal charges were also pending. (**Order #P-963, P-967, P-969**)
- An Order to Comply, issued to the owners of a property under a zoning bylaw, was not exempt because disclosure of it would not interfere with a rezoning application by the property owner made after the Order to Comply was issued. (**Order #M-575**)
- In order to claim this exemption, the Institution must discharge its burden of proof by indicating to the Commission how disclosure of the record would interfere with the law enforcement matter. (**Order #M-600**)
- Accident investigations carried out by the Ministry of Labour pursuant to the Occupational Health and Safety Act (OHSA) are "law enforcement" matters, because violations of the OHSA can lead to prosecutions conducted in a court where fines can be imposed (**Order #P-1011**).



ss.(1)(b)

- Investigations under the Liquor Licence Act are not completed until the Liquor Licence Board hearing is finalized. Therefore, even when a hearing date is set, this provision may apply if the institution provides sufficient evidence that premature disclosure could interfere with the investigation and prosecution process. (**Order #P-338**)
- Proceedings of a board of inquiry under the Ontario Human Rights Code would constitute a "law enforcement proceeding." Investigations by the Human Rights Commission must be allowed to continue without interference. Such investigations cannot be considered complete until either a board of inquiry has been appointed or the reconsideration process has been completed. Disclosure of records to the public prior to the completion of an investigation could interfere with the investigation. As such, the records are exempt. (**Orders #178, P-253, P-258, P-330**)
- Where a criminal investigation was not completed this exemption applied. (**Order #M-263**)
- In this case, the Commission ruled that this exemption applied to records concerning complaints made regarding the septic tank system in a locale and documents related to an appeal before the Environmental Appeal Board. While the board had issued its order, the Health Unit was in the process of undertaking steps to address the non-compliance. As a result, the law enforcement matter was ongoing. (**Order #M-268**)
- Where a police investigation is inactive for many years, this exemption does not apply. In this case, the requester sought records about himself prepared by the Ontario Provincial Police and provided to the Ontario Criminal Code Review Board at a hearing in 1985. The Commission found that disclosure of the records could not reasonably be expected to interfere with an investigation since the investigation could not reasonably be said to be ongoing. (**Order #P-775**)
- Information about travel arrangements for investigators assigned to investigate municipal corruption which was on-going at the time of the request could, if disclosed, reasonably be expected to interfere with the law enforcement investigation and was therefore exempt. (**Order #P-971**)

ss.(1)(a), (b)

- The word "interfere" in these sections refers to an ongoing investigation or law enforcement matter. (**Orders #P-285, P-316, P-403, P-449, P-547, M-315**)
- Where an investigation conducted by the Ontario Human Rights Commission was inactive since May of 1992 (the Order is dated January 1993), the disclosure of the records could not reasonably be expected to interfere with a law enforcement matter or investigation. (**Order #P-403**)



- Records regarding an investigation that was completed were exempt under this provision because the trial had yet to take place and the matter was before the court. The disclosure of information that directly relates to the prosecution of an offence prior to the termination of the trial could reasonably be expected to interfere with the preparation or conduct of that proceeding. (**Order #P-547**)
- The records of the Pay Equity Commission that are not exempt under s.17(1)(d) [FIPPA] \ s.10(1)(d) [MFIPPA] are not exempt under this provision. Here the information supplied by the parties to the negotiations were exempt under the above provision, and the Commission was not satisfied that the remaining information would result in the harm envisaged by this exemption. (**Order #P-653**)
- The Commission found that records related to information gathered about individuals who demonstrate would be exempt under these provisions, if they existed. Police would gather this information to investigate individuals about offences and disclosure may interfere with those investigations and also disclose how such investigations may be carried out. (**Order #M-432**)
- Various memoranda and records compiled by the Ministry of Community and Social Services to investigate a social assistance claim and prepare an eligibility review officer's report were exempt. (**Order #P-963, P-967, P-969**)
- An investigation by the Ontario Human Rights Commission is still on-going in circumstances where even though the Commission has finished gathering information or evidence about a human rights complaint, the Commission is still "reconsidering" its conclusions regarding an investigation. Therefore, the records at issue are exempt. However, correspondence between the Ontario Human Rights Commission and a respondent which merely contained information about various administrative stages in the processing of a complaint were not sufficiently connected to the actual investigation of the complaint to be exempt under this provision. (**Order #P-973**)
- Records deriving from the Ontario Human Rights Commission's "early settlement initiative" where the matter has not reached the Board of Inquiry stage or reconsideration stage are within this exemption (**Order #P-981**)

ss.(1)(a), (b), (f)

- Disclosure of information regarding the payment of fees by the Ministry of the Attorney General to a law firm on behalf of a named individual was not subject to this exemption. The information was in respect of libel proceedings launched by the lawyer in response to comments made against him while prosecuting a criminal case. The actions in this regard were civil actions and not criminal actions and this exemption did not apply. (**Order #P-676**)

ss.(1)(a), (b), (f), (l)



- Records that are factual in nature and that do not refer to particular individuals are not exempt in this case. The site plan of a custodial facility was not exempt because it was simply an aerial representation of the premises and contained insufficient detail to warrant any consideration of these provisions. **(Order #P-395)**
- In this case, records regarding administrative arrangements for police rental of cellular phones did not relate to specific law enforcement efforts and therefore the exemption did not apply. **(Order #M-519)**
- Institutions must provide sufficient information and reasoning to authorize the use of these exemptions. In this case a reporter sought the amount of money paid for the investigation of a child pornography joint forces investigation that lead to the arrest and prosecution of certain individuals. The Commission did not find that such disclosure would impair the fair trial rights of the accused or interfere with a law enforcement matter, though the trial was upcoming. **(Order #P-948)**

**ss.(1)(c)**

- Records that contain strategies, procedures and specific drug industry investigation targets, as well as other courses of action that if disclosed would reveal techniques and procedures currently in use or likely to be used in law enforcement, may be exempt under this section. **(Order #P-324)**
- The successful application of this exemption requires that the disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. If the technique is generally known, or such that a lay person would expect, reliance on this exemption would not be successful. **(Orders #170, 200, M-22, M-202, P-752, P-963, P-967, P-969, P-999)**
- That a Police Service makes use of cellular telephones is not information which would fall within this exemption. **(Order #M-519)**
- In this case, the Commissioner found that there did not exist a logical connection between the disclosure of cellular telephone numbers and the identities of the police personnel assigned to a police investigation. **(Order #P-999)**

**ss.(1)(d)**

- A complaint form containing the name, telephone number and address of the complainant in respect of a by-law contravention is exempt under ss.(1)(d) because the complainant believed that the information was provided in confidence and the institution's practices and policies supported this. **(Orders #M-4, M-10, M-16, M-20, M-31, M-36, M-43, M-70, M-81, P-302, P-312, M-147, M-244, M-246, M-582, M-513)**



- There must be evidence of the circumstances in which the information was provided to establish whether it is "confidential." (**Orders #139, P-304, P-405, P-478, M-147, M-174, M-202**)
- A complaint letter alleging that an insurer had breached the Insurance Act was exempt under this provision. In these circumstances, the complaint was made in confidence. (**Orders #P-302, P-304**)
- Records regarding confidential complaints made by individuals about price spreading by drug manufacturers which submit artificially high prices for inclusion in the Ontario Drug Formulary and Comparative Drug Index, while selling to pharmacists at much lower rates, are exempt at the discretion of the institution under this section. (**Order #P-324**)
- Individuals who provide information concerning alleged wrongdoing of bailiffs and others who are regulated by the Ministry of Consumer and Commercial Relations do so on the basis of confidentiality. Therefore, information that may reveal the identity of these individuals who have supplied information, such as names and addresses, in confidence is exempt under this provision. (**Order #P-478**)
- In this case, the Commissioner accepted that a confidential source could include a municipal councillor who is providing information about a by-law infraction on behalf of the complainants. The municipal councillor received information concerning a by-law infraction from the complainants and actually made the complaint to the Town. The Town could establish that it maintained a consistent policy of protecting the confidentiality of the names of complainants in by-law enforcement cases. As a result, there was a reasonable expectation of confidentiality and the exemption applied. (**Orders #M-147, M-246**)
- In this case, the Commission was satisfied that records prepared in the course of an investigation of murder and robbery contained information that was provided in confidence and that its disclosure could reasonably be expected to reveal the identity of a confidential source. (**Order #M-174**)
- An occurrence report submitted by a jail employee to the Ministry of Corrections superintendent which related to the conduct of an employee was not exempt. While the Ministry of the Solicitor General and Correctional Services has a law enforcement function, the matter that gave rise to the record in this case was not one that could be characterized as "law enforcement." The matters discussed in the report did not fall within the definition of "law enforcement" and the ministry was not enforcing or regulating compliance with any law regarding the employee's conduct. (**Order #P-588**)
- This exemption applied to letters of complaint that are received by the Ministry of Consumer and Commercial Relations regarding brokers seeking registration under the Real Estate and Business Brokers Act. The Ministry engages in an investigation, the findings of which may be reviewed by the Commercial Registration Appeal Tribunal. (**Order #P-701**)



- It was not shown how billing statements for police use of cellular telephones could be exempt under this provision. (**Order #M-519**)

ss.(1)(e)

- Disclosure of an occurrence number assigned to a police investigation file is not covered by this provision. (**Order #M-41**)
- Information about a police force's firearms and firearms training was not exempt under this provision, where the information was discussed publicly. (**Order #P-391**)
- This exemption was upheld by the Commission in respect of law enforcement investigation records created as a result of an incident that took place in a correctional facility. (**Order #P-657**)
- This exemption applied to a Security Plan for the Herd Reduction Program at Rondeau National Park. The techniques contained in the plan deal with diffusing violent situations and the Commission accepted that the effectiveness of the plan would be lost if it was disclosed. (**Order #P-745**)
- Disclosing information regarding invoice and account numbers of the police cellular phone numbers is not reasonably likely to result in the harm envisioned in this section. (**Order #M-552**)
- In this case disclosure of records related to an alleged bylaw offence dealing with the operation of a salvage yard was exempt under this provision. (**Order #M-560**)

ss.(1)(e) and (l)

- These provisions did not apply to an expense claim provided by an employee that disclosed where he conducted his business lunches. While the employee had been the subject of threats in the past, the locales were sufficiently unpredictable, and did not disclose a pattern. Thus, the information did not warrant the application of this exemption. (**Order #M-333**)

ss.(1)(f)

- The Ontario Court of Appeal ruled that the harms envisaged in the law enforcement exemption were satisfied where they "could" reasonably be expected to occur if disclosure was made. In this case, police officers were investigating an allegation of criminal activity said to have occurred in 1976 by staff at the Grandview Training School for Girls in Ontario. Charges were ultimately laid in this matter and the court ruled that disclosure of the records in advance of the trial could reasonably be expected to deprive the accused of the right to a fair trial. In these cases, the right to a fair trial, which is a right enshrined in the Charter of Rights and Freedoms (s.11), will be the governing principle. The institution's denial of access was upheld by the Ontario Court of Appeal. Given this decision, in instances where records



are relevant to allegations of criminal wrongdoing, institutions may deny access to the records pending a decision by law enforcement authorities not to proceed to a prosecution. (**Ian Wilson, the Archivist of Ontario and the Assistant Information and Privacy Commissioner, October 29, 1993, Ontario Court of Appeal**)

- In order to rely on this exemption the institution must demonstrate the deprivation in a realistic and reasoned fashion. The fact that there is no discovery process before the Crown Employees Grievance Settlement Board and that the disclosure may give the applicant an unfair advantage is not sufficient. (**Order #192, P-326, P-357**)
- Disclosure of records to a requester prior to his or her hearing under the Police Services Act was held not to contravene this provision. (**Order #M-362**)
- The Commission held that disclosure of records related to the murder of a Crown ward would not be exempt under this provision. The records related primarily to the actions of the institution in response to the failure of the Children's Aid Society to report the Crown ward's disappearance to the police. The fact that the trial of four accused allegedly responsible for the death of the Crown ward had yet to take place did not mean that disclosure to the media would deprive the accused of a fair trial. The Commission noted that the institution had not established that the disclosure would impair the accuseds' right to a fair trial. (**Orders #P-805, P-806**)
- In this case, the Commission found certain records, if released, could reasonably be expected to prejudice the trials of individuals who had been charged or will be charged in the future, and who have not yet appeared before court. In particular, the Commission found that the disclosure of a statement relating to anticipated pleas by some of the accused persons, the victims and some health related concerns could reasonably be expected to deprive one or more of the people subject to the investigation of the right to a fair trial. (**Order #P-999**)

ss.(1)(g)

- "Intelligence" is defined as information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information that is compiled and identifiable as part of the investigation of a specific occurrence. In this case, the Commission was satisfied that the police were collecting intelligence information in respect of the records requested. The records contained information about individuals other than the target of the investigation. (**Orders #M-202, P-650, P-999**)
- An affidavit to obtain a search warrant and a search warrant in respect of a police investigation are not exempt under this provision. (**Order #M-146**)
- In this case, letters of complaint addressed to an institution did not constitute "law enforcement **intelligence** information." In order to fall within the exemption, additional representations as to how the disclosure of the letters would be expected to interfere with the



gathering of law enforcement intelligence information are required. (**Order #P-583**)

- A billing statement for police use of cellular telephones is not gathered as contemplated by this provision. (**Order #M-519**)

**ss.(1)(h)**

- This provision provides a discretionary exemption where either the record at issue is itself a record that had been confiscated from a person by a peace officer in accordance with an Act or regulation, or where the disclosure of the record could reasonably be expected to reveal, by permitting the drawing of accurate inferences, the contents of another record which had been confiscated from a person by a peace officer in accordance with an Act or regulation. Where the record was discovered by security staff of a correctional centre during a search of an inmate's property, and was confiscated from the inmate by the superintendent of the correctional facility, this exemption was satisfied. Since superintendents are peace officers under the Ministry of Correctional Services Act, the record is exempt. However, where the record is an Occurrence Report, which simply documents the fact that other records were confiscated but does not describe them in any detail, the exemption does not apply. (**Orders #P-421, P-460**)

**ss.(1)(i)**

- Non-disclosure of information concerning the locations where animal research is conducted under this provision is not based on the identity of the requester's organization or its activities, but rather on the principle that disclosure under the Act must be viewed as disclosure to the public generally. If disclosed, this information could be available to all of the individuals or groups who are involved in the animal rights movement, including those who may elect to utilize acts of vandalism and property damage to promote their cause. Published articles concerning violent acts advocated by animal rights groups were sufficient evidence to establish that the disclosure of records containing information about facilities in which animal research was conducted would endanger security. (**Orders #169, P-252, P-557**)
- A request for the floor plans of various government buildings was properly denied under ss.(1)(I). Disclosure of these records could seriously compromise security. (**Order #P-217**)
- In this case, the records related to an incident that occurred over a year ago. This section was not satisfied in respect of current or future security where the records would reveal the assignment of a particular police officer to an area of a facility in the past. (**Order #M-127**)
- The Commission did not accept that audit reviews of a computer system, developed to monitor claims and payroll, contained information that was exempt under this provision. The audit reviews did not comment on the function of the system itself and therefore any link between the disclosure of the reports and possible fraud was not reasonable. (**Order #P-603**)



- Records containing an inventory of microcomputer equipment and maintenance agreements, regarding minicomputer equipment and electronic mail messages and regarding facsimile machines that contain the make, model, serial number and location of the equipment, were not accessible as a result of this exemption. The Commission was satisfied that the security of the computer systems and facsimiles could be infiltrated with the result that the systems could be disrupted. **(Order #P-649)**
- Records regarding names and Internet addresses for all computer network systems operated by several ministries were exempt under this provision. The items consisted of the data stored on Ontario government computers. The Commission held that this information required protection since much of it is sensitive and deals with personal information of members of the public. The system, established for the protection of this data, is the Ontario government's Internet gateway, which allows outside users access to the public section of the government's network but not the private section. **(Order #P-756)**
- In this case disclosure of information about the components, layout and programming of the automated systems at pumping stations which are used to control the mechanical equipment and alarm systems could reasonably be expected to cause probable harm. **(Order #M-535)**
- Building plans submitted by a developer to a municipality for review prior to issuing a building permit under the Building Code which described the doors, areas of stores not accessible to the public, roof access, power supply locations, computer systems, telex and communications satellite, power drops, security systems, electrical switches and fire systems and alarms were exempt. **(Order #M-520)**

**ss.(1)(i) and (l)**

- Information related to an alleged computer system transmission failure on a particular date, a listing of frequencies used by the police for data transmission, speed of modems, stop bit and parity, and all information relating to the use of computer services available in police vehicles kept by a police services board, were exempt under these provisions. **(Order #M-329)**

**ss.(1)(j)**

- The term "facilitate" means to make easier or less difficult. The exemption applies to records concerning a maximum security institution, including construction plans, drawings for new windows and material to be used in construction such as locks and bars. The records in this regard need not be extremely detailed. **(Order #187)**
- In this case, a handwritten diagram of the search area of a maximum security detention centre was not exempt under this provision. The Commission ruled that the diagram was not sufficiently detailed and that its disclosure would reasonably compromise the security of the facility or facilitate the escape from custody of an inmate of the facility. Mere possibility of harm is not sufficient. **(Order #P-597)**



ss.(1)(k)

- Release of an in-house telephone directory, revealing names and phone numbers of staff and various departments, which are not normally available to the public, was exempt. It would jeopardize the security of the mental health centres, which are centres for lawful detention. **(Order #77)**
- This exemption was upheld in respect of records created as a result of a law enforcement investigation into an incident that occurred in a correctional facility. The institution stated that the disclosure would reveal policies and procedures in place at the correctional facility, relating to inmate movement, contraband and searches. The information was not generally available to the public for security reasons. **(Order #P-657)**

ss.(1)(I), (j), (k)

- The site plan of a correctional facility containing the grounds and buildings if disclosed could compromise security and was therefore exempt under these provisions. **(Order #P-395)**

ss.(1)(j), (k)

- These provisions did not apply to directives or memorandums issued to correctional facilities that outlined the administrative procedures to follow relating to the discovery of contraband, such as who is to be notified and how records ought to be maintained and kept. The records did not deal with procedures to deal with the incident itself. **(Order #P-686)**

ss.(1)(I)

- The disclosure of codes used by the police, which are used to ensure that information is passed efficiently from one police source to another and that anyone intercepting the message would be unable to determine the content or import of the message, may not be exempt under this provision. The Commission noted that in respect of this particular code, the police had failed to establish a clear and direct linkage between disclosure of the information and the harm alleged in this provision. **(Order #M-199)**
- Police records regarding a chemical formula for manufacturing a well-known narcotic and the construction of explosive devices were held to be exempt under this provision. **(Order #M-202)**
- In this case, the Commission was not satisfied that the disclosure of records referable to a police radio frequency would be exempt under this provision. **(Order #M-267)**
- The disclosure of an internal police memorandum dealing with the approach taken by the police concerning the behavior known as "stalking" would not be covered by this exemption. The Commission found that the disclosure of this information, particularly in light of Bill C-



126 that created the new offence of criminal harassment, would not result in individuals engaging in this activity. (**Order #M-341**)

- A message code (sometimes referred to as a "ten-code") used by police officers in their communications with one another was exempt under this provision. The Commission found that disclosure of these codes could place the police officers in potentially dangerous situations or could facilitate the commission of unlawful acts. (**Order #M-393**)
- The ability of the police to investigate and solve crimes would be adversely affected by the disclosure of the cellular telephone numbers and the names of those who use them, as well as the date, time, originating location and billed time for each call. The police provided sufficient evidence to demonstrate that there exists a reasonable expectation that the harm envisioned by this section would occur should this information be disclosed. However, the disclosure of the account and invoice numbers could not reasonably be expected to result in the facilitation of the commission of an unlawful act or interference with the control of crime by the police. (**Order #M-552**)
- Cellular telephones are important police tools in the investigation and prevention of crime. If they become less available due to telephone lines being tied up with calls from the public, the police's ability to prevent and investigate crime could be hampered. In this case, the police supplied sufficient evidence to demonstrate that disclosure of the cellular telephone numbers and the names of those who use them could reasonably be expected to hamper the control of crime. (**Order #M-554**)

#### ss.(2) General

- This provision deals broadly with the confidentiality that necessarily surrounds law enforcement investigations in order that institutions charged with external regulatory activities can carry out their duties. Therefore, an internal investigation into program administration within a correctional facility is not included. (**Order #98**)
- This exemption applies to records containing information regarding the exact location of archaeological sites which, if disclosed, could result in increased number of incidents of looting, thereby facilitating the commission of an unlawful act. (**Order #P-885**)

#### ss.(2)(a) Agency

- Records derived from an internal investigation into the operation of a training school are not covered by this provision. Upon completion of the investigation, the ministry was not in a position to enforce or regulate compliance with the Training Schools Act or any other law. Rather, it determined that the allegations warranted further investigation and forwarded the report to the Crown attorney's office. As a result, the police force and the Crown attorney's office have the regulatory responsibilities envisioned by this section. (**Orders #P-352, M-315**)



- Where, previously, the Superintendent of Insurance had the responsibility of supervising the business of insurance in Ontario and was obliged to see that the Insurance Act and regulations were enforced and obeyed, it was an agency that had the function of enforcing and regulating compliance with a law. (**Order #P-304**)
- "Agency" includes organizations acting on behalf of or as agents for law enforcement agencies. Therefore, the Investment Dealers Association is an "agency" because the Ontario Securities Commission has informally delegated the investigatory function to it. (**Orders #30, 90, P-342**)
- An internal investigation of an employee for breach of contract is done by the Ontario Securities Commission as employer, and not as a regulatory agency. In order for the investigation to be characterized as "law enforcement," it must be conducted with a view to providing a court or tribunal with the facts to determine an individual's rights. (**Orders #157, 98, 170, 182, M-46, P-352, P-411, M-315**)
- Where the Ministry of Correctional Services conducts an investigation into a disturbance at a correctional facility, the resulting report is covered by this provision. (**Order #P-250**)
- A municipality's Health Department is an agency that has the function of enforcing and regulating compliance with the Health Protection and Promotion Act. Health inspectors have statutory authority to enter premises where a health hazard exists to conduct tests, examinations, investigations and inquiries, and issue written orders to remedy any identified problems. Reports deriving from investigations in this regard are exempt under clause (2)(a). (**Order #M-105**)
- The Loan and Trust Corporations Act (the LTCA) establishes the Ministry of Finance, through the Minister, the Superintendent of Deposit Institutions and the director, as the agency responsible for the regulation of registered trust and loan companies in Ontario. The Act provides for examinations, audits and inspections of registered corporations and for enforcement. In this case, a private audit firm was formally retained by the ministry. The Commission ruled that this exemption applied even though the records were prepared by an outside consultant. In this case, the ministry had the authority to obtain the private audit and to require the full co-operation of the corporation in the process. (**Order #P-480**)
- The Toronto Stock Exchange (TSE) acted as the agent for the Ontario Securities Commission (OSC) in investigating a complaint made against the requester in this case. The OSC is an agency that has the function of enforcing and regulating compliance with the law and the records prepared by the TSE during the course of such an investigation satisfied the second and third parts of the test in this exemption. (**Order #P-548**)
- The Public Complaints Commission is an agency that has the mandate to investigate possible infractions of the Police Services Act and it is therefore an agency which has the function of enforcing and regulating compliance with a law. (**Order #P-659**)



- Investigations under the Real Estate and Business Brokers Act, undertaken by the institution's Real Estate Regulation Branch, were conducted by an "agency" which has the function of enforcing and regulating compliance with a law within the meaning of this provision. (**Orders #P-621, P-670**)

## ss.(2)(a) "Report"

### General

- A "report" must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, reports would not include mere observations or recordings of fact. (**Orders #200, P-221, P-285, P-304, P-315, P-323, P-324, P-342, P-352, P-363, P-390, P-392, P-399, P-403, P-410, M-12, M-15, M-17, M-22, M-52, M-74, M-78, M-84, P-411, P-417, M-105, P-449, M-127, P-467, M-158, P-480, P-492, P-510, M-176, P-548, M-198, M-202, P-598, P-583, M-217, M-214, M-245, M-247, P-659, P-670, P-677, P-701, M-364, M-366, P-770, M-397, M-544, M-560, M-569, P-923, P-932, P-973**)
- The test in ss.(2)(a) does not require any evidence that harm would result from the disclosure. If all of the record is determined to be a "report," and is within this provision, it may be exempt in its entirety. It is unnecessary to sever where the whole report falls within the exemption. (**Orders #30, 38, 94, 124, 134, 137, 200, P-221, P-239, P-250, P-285, M-84**)
- Complaint processing reports and internal memoranda are "reports" prepared in the course of law enforcement. (**Orders #37, 170, P-315**)
- Records containing only factual references and the terms of the engagement of a private audit firm are not "reports." (**Order #P-480**)
- This provision contemplates a report that is prepared as part of an actual investigation, inspection or law enforcement activity. It would not therefore include a record written in response to a letter. (**Orders #188, P-304, M-176, P-583**)
- A "report" may include a broad range of documents, providing information or opinions that were prepared in the course of law enforcement inspections or investigations. However, a dismissal letter to an employee cannot be considered a "report." Similarly, a notice of hearing document is not a "report." (**Order #170**)
- An Order to Comply, which is issued to enforce a by-law infraction in respect of a property, is not a report as contemplated by this provision as it does not consist of formal statements or accounts of results from a collation or consideration of information; it is simply a notification that repairs have to be done. (**Order #M-15, M-34**)



## Police "Reports"

### (a) The Following Are "Reports"

- In this case the Commission held that a formal statement or account of the results of an investigation prepared by the Royal Canadian Mounted Police regarding possible illegal activity was a "report". (**Order #P-315**)
- In this case, the records of a police investigation into an allegation of assault were "reports" and were exempt in their entirety. The allegation was found to be not credible and consequently it was drafted in such a way as to be a "report" as that term was defined by the Commission. (**Order #M-84**)
- Records created as a result of an internal investigation of a police force regarding potential charges under the Police Services Act are "reports." They contain summaries of the investigation, findings of fact and conclusions. They were prepared by the special investigations unit, an agency that has the function of enforcing and regulating compliance with the law. This section does not require that a report meet additional criteria such as a reasonable expectation of some harm resulting from the disclosure. (**Orders #M-78, M-366, P-770**)
- Records created by a police officer employed by the Public Complaints Investigation Bureau in the course of the investigation of a complaint related to the enforcement of the Police Services Act were "reports." (**Order #M-245**)
- Ontario Provincial Police records prepared in respect of investigations of crimes committed under the Criminal Code of Canada were "reports" because they contained summaries of the investigations, findings of fact by the investigator, conclusions about the validity of the allegations and recommended courses of action. The investigations were conducted in order to determine whether grounds existed to warrant charges being laid. (**Order #P-467**)
- An "Occurrence Report" and an "Investigation Report" concerning investigations of allegations of improper conduct made by the appellant against ministry staff while the appellant was an inmate at a correctional facility operated by the ministry, is a "report." (**Order #P-399**)
- All records contained in the Crown brief and provided to the Crown attorney in a criminal prosecution were held to be exempt as "reports". The Commission ruled that this included witnesses' proposed statements prepared in contemplation of a criminal prosecution. The Commission ruled that the Act does not affect or interfere with the disclosure procedure existing between the Crown and accused person. (**Order #39, see contra below**)
- A "Special Examination Report" prepared by the Ministry of Finance investigation unit with allegations registered against a Trust Company is a report within the meaning of this section because it consists of a formal statement or account of the results of the collation and



considerations of information. **(Order #P-923)**

- A report prepared for the OPP Deputy Commissioner by an OPP officer during the course of an investigation under the Criminal Code and the Narcotics Control Act is a "report" under this subsection. **(Order # P-932)**

(b) The Following Are Not "Reports"

- In this instance, the Commission ruled that the contents of a Crown brief in a criminal prosecution were not "reports" because they contained observations or recordings of fact. However, the "Alcohol Influence Test Report" was found to be a "report" under this section because it was a formal statement of the results of the collation and consideration of information. **(Order #M-52. This decision represents a departure from Order 39, as above.)**
- "General Occurrence Report" and "Supplementary Report," consisting of narratives prepared by police officers recounting their actions in an investigation, are not "reports" as they consist solely of recordings of fact. **(Order #M-397)**
- An inspector's notes regarding an investigation of a by-law infraction were not a "report." The Commission noted that the record was a pre-printed form which provided for the recording of the particulars of the complaint. The form was designed as an ongoing record of steps taken by the enforcement staff. The "conclusion" was found to be a final or concluding statement of fact. The Commission stated that the fact that a notation may be indicative of some conclusion by its author related to other facts contained in the document is not enough to render it a "report." **(Order #M-217)**

Human Rights Commission "Reports"

(a) The Following Are "Reports"

- Records reflecting reconsideration by the Human Rights Commission in respect of holding an inquiry for certain complaints is a "report." **(Order #P-253)**
- The Ontario Human Rights Commission Case Disposition Sheet is a report as it contains an analysis of information that has been gathered respecting a case. It contains brief background information and staff recommendations as to whether the evidence warrants the appointment of a Board of Inquiry. However, documents reflecting interviews with witnesses, and "records of intake" are not "reports." **(Orders #P-449, P-510, P-598)**
- "Case Disposition" records, created by the Ontario Human Rights Commission during an investigation, are "reports" under this section. These records contain the background of the complaint, the grounds for the allegation, an analysis of the results of the investigation and staff recommendations. "Records of Intake, Conciliation and Investigation" are not "reports" because they consist solely of a recording of facts relating to the complaint. **(Order #P-492)**



- An Ontario Human Rights Commission record containing the officer's response to parties' submissions was held to be a report. (**Order #P-973**)

(b) The Following Are Not "Reports"

- An Ontario Human Rights Commission investigation resulted in the creation of the complainant's handwritten notes, notes of telephone conversations and interviews, the officer's plans regarding the conduct of the investigation and notes taken by the officer during a hearing. These records are not "reports" as the term is used in this section. (**Order #P-403**)
- A handwritten account of a Human Rights Officer's conversation with a third party during an investigation does not constitute a "report." (**Order #P-510**)
- A "fact sheet" and "intake report," completed by a human rights officer during the initial stages of an investigation by the Human Rights Commission, contain recordings of fact rather than a formal statement of the results of the investigation. As a result, the records are not "reports" as envisaged by this section. (**Orders #P-363, P-417**)
- A "case closing statistical data report" is not a "report" under this section. The Commission ruled that the record merely captures the statistics regarding the manner in which a case is resolved, the nature of the settlement and the hours spent working on the file. In addition, notes of interviews with individuals conducted as part of an investigation are not "reports." (**Order #P-598**)

Other

(a) The Following Are "Reports"

- Investigation reports prepared in the course of investigations under the Truck Transportation Act are "reports" because they summarize the investigations, make findings of fact and draw conclusions about the validity of the complaints. Since the other parts of the test in **Order 200** were met, the exemption applied. (**Order P-390**)
- The Ministry of Consumer and Commercial Relations, through its Cemeteries Branch, enforces and regulates compliance with the Cemeteries Act. Failure to comply with the Act may result in a prosecution. The exemption in this provision applies because the records generated in an investigation are "reports" that were prepared by an investigator with the Investigations and Enforcement Branch of the ministry, which has the function of enforcing and regulating compliance with the Cemeteries Act. (**Order #P-410**)
- Memoranda prepared by the Metropolitan Toronto Licensing Commission, in respect of a by-law enforcement investigation, are "reports" under this section. The records analyze the facts that were observed and consist of a formal statement or account of the results of the investigation. (**Order #M-158**)



- "Case Summaries" prepared by an investigator employed by the Public Complaints Commission is a "report." It contains the conclusions reached in respect of the allegations as well as recommendations to the Police Complaints Commissioner. (**Order #P-659**)
- Records created by an inspector as a result of an investigation under the Real Estate and Business Brokers Act of a real estate broker were "reports." The records included information compiled as part of the investigation as well as inspection reports. For example, general ledger, list of salespersons, trust accounts, term deposits, letters and deposit receipts were considered "reports." (**Order #P-670**)
- Records created as a result of investigations conducted by the Ministry of Consumer and Commercial Relations under the Real Estate and Business Brokers Act are "reports". The ministry is an agency with law enforcement responsibilities in this regard and the records are formal accounts of the investigations. (**Order #P-701**)
- Inspection reports, deficiency notices and other records related to inspections and investigations concerning compliance with the Ontario Building Code Act and the Ontario Building Code do not qualify as "reports" under this provision because they only contain recordings of fact. (**Order #M-364**)
- Documents containing investigative results and analysis used to support the Ministry's revocation of a licence constitute "reports" for the purposes of this section. They were prepared as part of the investigation into the business affairs of a collection agency and prepared by the Ministry in the context of its responsibilities to enforce the provisions of the Collection Agencies Act, qualifying them for this exemption. (**Order #P-952**)
- An occupance report prepared by a bylaw enforcement officer for the bylaw enforcement administration of a municipality was a report within the meaning of this section. (**Order #M-560**)

(b) The Following Are Not "Reports"

- A Licensing Enforcement Officer's notes in a notebook, in respect of an investigation, are not a "report" because the notes are not a formal statement or account of the results of the Officer's work; they are a series of entries outlining observations with respect to the investigation. (**Order #M-17**)
- A Weed Inspection Report is a not a "report" under this section. The reports contain chronological outlines of the inspector's activities over the reporting period and provide some detail of the investigations, inspections and enforcement efforts undertaken. The inspector is appointed under the Weed Control Act, which provides him or her with the duty to enforce the Act. Despite this, the report is not prepared as part of individual investigations. The report is an outline of all the inspector's activities and it is prepared for council as part of the employer\employee relationship. (**Order #M-176**)



- Letters from the Director of Investigative Services to the Chief Investigator of the Ontario Securities Commission (OSC) which stated that an investigation had been commenced against an individual were not "reports." The letters did not collate or consider information. Other records prepared during the investigation did qualify as "reports." For example, a memorandum that summarized and commented on the contents of the investigation report and made recommendations about the matter was a "report." (**Order #P-548**)
- Notes of questions that Ontario Securities Commission investigators wanted to ask, a memo prepared by legal counsel commenting on matters under investigation, handwritten notes concerning issues under investigation and notes taken by the law enforcement agency's counsel at a meeting with an affected party are not "reports" under this subsection. An "analysis" of the investigation that was prepared in the course of the investigation was a "report" under this subsection. (**Order #P-583**)
- The "Review Officer Final Report," the "Application for Review Services," and notes of meeting dates and positions of representatives of the parties prepared by the Review Officer appointed under the Pay Equity Act are not "reports" as the term is used in this section. The final report is used for statistical purposes and record keeping and does not include more than statements of fact. (**Order #P-653**)
- While it is possible that a "report" can include appendices or attachments as an integral part of the document, a letter from the Regional Coroner is not integral to the formal accounting of the results of the collation and consideration of information in a Sudden Death Report and therefore this section does not apply to it. (**Order #M-544**)

**ss.(2)(a)--Internal Investigations that are not "Law Enforcement"**

**(See as well, s.2 definition of "law enforcement" for more cases in respect of internal investigations.)**

- Records created as a result of an investigation conducted by the Professional Standards Branch of a Board of Commissioners of Police, and not the Ontario Civilian Commission on Police Services, are not exempt under this provision. The Professional Standards Branch is a body responsible for reviewing internal employment-related disciplinary matters, and is not a regulatory or law enforcement agency involved in "law enforcement" activities as the term is used in the Act. The record at issue was created as a result of an investigation that was conducted by the police in their role as an employer, not as a regulatory or law enforcement agency. This was so even though the report was the basis for an investigation conducted by the Ontario Civilian Commission on Police Services. (**Order #M-98**)
- Where an institution is conducting an internal investigation, and not one that relates to its external regulatory activity, the records are not covered by this exemption. The institution is not in the position to enforce any offence following the investigation. (**Re Solicitor General of Ontario et al. and Assistant Information and Privacy Commissioner et al., (1993), 102 D.L.R. (4th) 602 (Ont.Div.Ct.)**)



- Where a record was prepared in the course of a supervisor's internal investigation into the conduct of an officer of the court, it was not an investigation that carried with it the possibility of a "law enforcement" proceeding. As a result, this section does not apply. (**Order #P-392**)

ss.(2)(b)

- Records concerning an internal investigation into the operation of a training school, and the conduct of certain employees at the training school are not law enforcement records. Since the records do not identify an individual as a "young person" who has been dealt with under the Young Offenders Act, the disclosure would not constitute an offence. The Young Offenders Act does not apply since these records are not records referable to an investigation into an alleged offence committed by a young person. (**Order #P-352**)

ss.(2)(c)

- In order for a record to be a "law enforcement record," an institution must establish that it has a law enforcement mandate. While the Workers' Compensation Board does have the power to impose penalties or sanctions in certain contexts, it does not in relation to allegations of fraud. Allegations of fraud must be dealt with by the police and prosecuted by the Crown attorney's office. (**Order #M-315**)

ss.(2)(d)

- This provision cannot be used to deny access to a requester who is no longer in custody or under the control or supervision of a correctional authority and is seeking information about himself. The purpose of this provision is to allow an appropriate level of security with respect to the records of individuals in custody or under supervision. (**Orders #98, P-352, P-399, P-460, P-675**)
- In this case, records that were created almost 10 years ago and which related to investigations that have long since been completed would not interfere with the ministry's ability to carry out its mandate in respect of an individual who is no longer under the supervision and control of the ministry. (**Order #P-399**)
- Where the records themselves do not describe in any detail how searches for contraband in a jail setting are done, the disclosure of the records would not hinder or compromise effective execution of search warrants, or utilization of search procedures or techniques within correctional facilities. As a result, the records would not be exempt under this provision. (**Order #P-460**)



ss.(3)

- In any case, where the head refuses to confirm or deny the existence of the record, discretion must be exercised in accordance with established legal principles. (**Orders #106, 170 (at pages 55-56), 195, 199, 213, P-254, P-255, P-262, P-308, P-344)**)
- An institution relying on this provision must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption. The institution must establish that disclosure of the mere existence or non-existence of such a record would communicate to the requester information that would fall under the exemption. In this case, the Commission found that the investigation and the nature of the allegations were public knowledge and that the exemption would not apply to the disclosure of the mere existence of the records. (**Orders #P-542, P-543, M-267, M-332, M-329, M-402, M-432)**)
- Where an institution is ordered not to refuse to confirm or deny the existence of a record, the Commission will release the order to the institution before it releases it to the appellant in order to provide the institution with an opportunity to review the decision and determine whether to apply for judicial review. (**Orders #148, P-423)**)
- The Commission ruled that it was not satisfied that the use of this provision offended the Charter of Rights and Freedoms. The Commission noted that it did have the jurisdiction to determine Charter issues. (**Orders #106, P-254, M-198)**)
- The application of this provision in an inflexible way to all cases involving a particular type of record would represent an improper exercise of discretion. The head must take into consideration factors personal to the requester and must ensure that the decision conforms to the policies, objectives and provisions of the Act. (**Order #P-344)**)
- In order to use this provision, an institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester. Where sufficient evidence is not provided, this provision cannot apply. (**Orders #P-338, P-339, M-46, P-423, M-150, P-542, P-543)**)
- In this case, the Commission ordered the institution to confirm or deny the existence of the records in question because it had not provided any representations in support of the refusal to confirm or deny. The Commission noted that a requester who is denied the right to know whether a record exists or not is in a very different position than a requester who is denied access to a record. The Commission ruled that the discretion that the institution has in this regard should be exercised in only rare cases. Where there is a discretionary exemption, in the absence of representations in support of the exemption, the application of the exemption will not be upheld. (**Order #M-150)**)



- The fact that the decision under this subsection is appealed to the Commissioner does not signify to the appellant that the record does exist. The Commissioner will review the **type** of record sought, and the appellant may argue that the **type** of record sought ought to be released. (**Order #106**)
- The Commission found that the police services board could refuse to confirm or deny the existence of certain records related to their computer systems. The information was exempt under ss.(1)(i) and (l) of this exemption. (**Order #M-329**)
- The Commission denied the police the ability to refuse to confirm or deny the existence of any investigations into the operation of any computer bulletin board services. While the records themselves were held to be exempt under this exemption, the Commission found that the disclosure of the mere existence of the records was mandated. (**Order #M-402**)
- The Commission found that this provision did not apply to a request for records allegedly kept by the police on individuals who demonstrate. The Commission noted that a police chief was quoted in the media as stating that these sorts of records were routinely kept. Consequently the Commission could not find that the mere disclosure that the records exist would contravene ss.(1) or (2). (**Order #M-432**)
- Even though it may be appropriate for an institution to refuse to confirm or deny the existence of a record at the time of the request, the Commissioner may nonetheless order disclosure of the records if circumstances have changed at the time of the appeal. In this case, where a criminal investigation was concluded and criminal charges were laid, the Commissioner concluded that communicating the existence or non-existence of a record would not communicate information to the appellant which would fall under the law enforcement exemption. (**Order #M-450**)

#### ss.(4)

- To determine whether an inspection is "routine," one must review the practice of the agency. The fact that complaints are regularly investigated does not make them "routine." Complaint-driven inspections cannot be said to be "routine." (**Orders #136, 137, P-323, P-480**)
- Inspections carried out by the Ministry of Financial Institutions under the Mortgage Brokers Act are "routine" where they are initiated solely by the institution in furtherance of its general regulatory role and where no reference is made to any specific complaint. This is true even though the inspections are conducted on a discretionary basis and not at regular intervals. Personal information in routine inspections may, if exempt under the personal information exemption, be severed. (**Order #P-323**)
- "Routine" inspections are those that are not complaint-driven. The determination of whether an inspection is "routine" does not depend on the degree of complexity or sensitivity of the records. Where inspections or examinations are required to be done under the Loan and Trust Corporations Act (LTCA, s.184) on a periodic basis, the inspections or examinations



are "routine" as contemplated by this provision. However, where the inspection is done under s.183 of the LTCA, at the discretion of the director, then the inspection is not "routine."  
(Order #P-480)



A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

(b) reveal information received in confidence from another government or its agencies by an institution; or

(c) reveal information received in confidence from an international organization of states or a body thereof by an institution,

and shall not disclose any such record without the prior approval of the Executive Council.

(1) A head shall refuse to disclose a record if the disclosure could reasonably be expected

to reveal information the institution has received in confidence from,

(a) the Government of Canada;

(b) the Government of Ontario or the government of a province or territory in Canada;

(c) the government of a foreign country or state;

(d) an agency of a government referred to in clause (a), (b) or (c); or

(e) an international organization of states or a body of such an organization.

(2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.







## General

- For a record to qualify for exemption, an institution must show: 1) the records reveal information received from another government or its agencies; and 2) the information was received by an institution; and 3) the information was received in confidence. (**Order #P-883**)
- A head must apply his or her discretion to each record and cannot rely simply on "practical experience" to exempt a group of records under this exemption. (**Order #56**)
- This exemption requires that the expectation that disclosure of a record could prejudice the conduct of intergovernmental relations or reveal information received in confidence by the institution from another government or its agencies, must not be fanciful, imaginary or contrived, but rather one that is based on reason. (**Orders #P-270, P-293, P-480**)
- The Commission confirmed that reasonable expectation of harm required that the institution establish a clear and direct linkage between the disclosure of the information and the harm alleged. The Commission approved of the position taken by the Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture) [1989] 1 F.C. 47 at 59-60, where the Court indicated that a "reasonable expectation of probable harm" was required. It also approved of the Federal Court Trial Division's decision in The Information Commissioner of Canada v. The Prime Minister of Canada, unreported, November 19, 1992, where the Court stated that the mere "possibility" of harm was not sufficient. The Court held that descriptions of possible harm, even in substantial detail, are insufficient in themselves. Justice Rothstein stated that:

The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantial the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a Court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged...While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality, would...be more difficult to satisfy.

(**Order #P-534**)



- A proposed agenda and other records which would reveal the substance of Ontario's proposal to the federal government for resolving an international trade dispute were exempt. (**Order #P-883**)
- This order established a three part test for records to qualify under this section. In this Order, the test was restated, for the purpose of making it more straightforward: (**Order #210**)
  1. the relations must be intergovernmental, that is relations between an institution and another government or its agencies; **and**
  2. disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

In this case, the Commission determined that the requested records, if disclosed, could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada. This presumption was based on the sensitive and complex nature of land claims negotiations generally and the particulars of these records which included the need for ongoing negotiations to implement a land settlement agreement. (**Order #P-908**)

#### **s.15(a) and (b)**

- While Atomic Energy of Canada Ltd. (AECL) and Ontario Hydro are not governments, they are capable of conducting intergovernmental relations on behalf of their respective governments. As a Crown corporation, AECL exercises its powers only as an agent of the Crown. Similarly, Ontario Hydro is a Crown corporation and an agent of the Ontario government. Where they conduct business through a joint committee of representatives, information received by Ontario Hydro from AECL may be covered by s.15(b) [FIPPA]. (**Order #P-270**)
- A draft agreement between the federal government and the United States concerning beer trade was exempt. (**Order #P-883**)

#### **s.15(a)**

- To qualify for exemption an institution must establish that: 1) disclosure of the records could give rise to an expectation of prejudice to the conduct of intergovernmental relations; and 2) the relations which it is claimed would be prejudiced must be inter- governmental, that is relations between an institution and another government or its agencies; and 3) the expectation that prejudice could arise as a result of disclosure must be reasonable. (**Order #P-883**)
- A record that discloses the fact that a company will engage in negotiations with the federal government does not relate to intergovernmental relations between the province and the federal government. Also, the disclosure of a record containing an undertaking by the province to negotiate with the federal government cannot reasonably be expected to prejudice



intergovernmental relations. (**Orders #87, 210, P-270, P-293, P-388, P-435, P-630**)

- The fact that disclosure of the records would prejudice the relationship between the mining industry and the federal and provincial governments is not sufficient to satisfy this provision. It is intergovernmental relations that must be prejudiced in order to satisfy this exemption. (**Order #P-388**)
- The possibility that disclosure of the record would prejudice the relationship between the private sector and the government is not covered by this exemption. The prejudice must be to intergovernmental relations. (**Order #P-435**)
- A settlement proposal received by the provincial government between the Algonquins of the Golden Lake First Nation (AGL) and the Government of Canada and the Government of Ontario was held to be exempt under this provision. The Commission was satisfied that the process was sensitive and confidential and that prejudice between Ontario and Canada would result from untimely disclosure. In addition, the Commission ruled that the negotiations between Ontario and Canada are intergovernmental in nature. (**Order #P-630**)
- Disclosure of correspondence between counsel at the Ministry of the Attorney General and the British Lord Chancellor's Department in respect of the Hague Convention on the Civil Aspects of International Child Abduction could reasonably be expected to prejudice intergovernmental relations. (**Order #P-236**)
- Correspondence between the senior justice officials of two governments that deals with highly sensitive and controversial issues may be exempt. (**Order #123**)
- The relations in question must be intergovernmental rather than among agencies of the same government. (**Order #P-859**)
- Minutes of a meeting attended by federal and provincial tax administrators regarding the interpretation of tax laws fell under this exemption. (**Order #P-876**)
- Although the Federal government had not been provided with copies of the communications strategy for public consultation regarding fishing rights for First Nations, these records relate to matters in which the Federal Government had an interest and relate to its relationship with the province. (**Order #P-961**)
- The fact that the two Federal Government Departments most closely connected with the request had consented to the disclosure of certain of the records does not mean that disclosure would not prejudice the conduct of intergovernmental relations between Ontario and Canada. In this case, Ontario's argument persuaded the Commission that the exemption applied. (**Order #P-961**)



s.15(b)

- Section 15(b) [FIPPA] is intended to protect the free flow of information from other governments or their agencies to Ontario institutions which are carrying out their respective "governmental" functions. It does not apply to records provided by Revenue Canada to the institution where the relationship was that of tax collector and taxpayer. (**Order #P-263**)
- This provision may be satisfied where information is received implicitly in confidence. Nevertheless, the institution must provide sufficient evidence that the information was received in confidence. (**Orders #P-304, M-128, M-221, P-627**)
- A municipality is not "another government" for the purposes of s.15(b) [FIPPA]. (**Order #69**)
- This provision cannot apply to records that were sent from the institution to the other government. (**Order #P-278**)
- Records compiled by the Royal Canadian Mounted Police (RCMP) regarding arson and fraud investigations of the requester are provided in confidence to the provincial police force. The records are then given to the Ministry of the Attorney General for the prosecution. This exemption is satisfied because the RCMP is an agency of another government and the records were received in confidence. The expectation of confidence continued when the police provided the documents to the ministry. (**Order #P-368**)
- Information supplied in confidence by the Federal Health Board is covered by s.15(b) [FIPPA]. (**Order #68 and see Orders #210, P-278, P-304, P-369 for other examples**)
- Records prepared by the federal government for the institution in respect of an in camera federal inquiry are covered by section 15(b) [FIPPA]. (**Order #123**)
- Notes made from manuscripts from an in camera inquiry fall within s.15(b) [FIPPA] when they are provided to a provincial government ministry from the federal government. Similarly, the transcript of a confidential meeting between governments is exempt under s.15(b) [FIPPA]. (**Orders #123, 124**)
- Where records about an individual were received by the Ontario Insurance Commission and the Ontario Securities Commission from the Royal Canadian Mounted Police in confidence, they are exempt under this provision. (**Order #P-452**)
- Records received by the Ministry of Finance from the Canada Deposit Insurance Corporation, in respect of the ministry's regulation of loan and trust companies, were provided in confidence and were exempt under this provision. (**Order #P-480**)
- The Commission found that this exemption applied to a report received by the Ontario Native Affairs Secretariat (ONAS) from Indian and Northern Affairs Canada (INAC) relating to a



First Nations land claim. It was determined that the Government of Canada forwarded sensitive information contained in its historical reports only to the parties to the negotiations involved in land claims and that these materials were supplied in confidence. The protocols between the parties to the negotiations supported the confidential nature of the information. (Order #P-730)

**s.9(1)(a) MFIPPA : NOTE: This section is unique to MFIPPA; It is comparable to s.15(b) of FIPPA**

- Records provided by the Department of National Defence (DND) to a City to plan for a public display of military equipment were not exempt under this provision. At the time the records were provided to the City, no reference to confidentiality was made. The records were provided in respect of previous events and had at one time been distributed to members of the public who were involved in planning the previous events. Even though an expectation of confidentiality was alluded to in subsequent meetings with the DND, the Commission found that the "in confidence" test had not been met. (Order #M-151)

**s.9(1)(a) MFIPPA : NOTE: This section is unique to MFIPPA; It is comparable to s.15(b) of FIPPA**

- Computer printouts of the criminal history of the appellant were obtained electronically from the Canadian Police Information Centre (CPIC). The information in CPIC is comprised of information originally entered in the system by various law enforcement agencies, including non-federal sources. The Royal Canadian Mounted Police (RCMP), while responsible for the administration and maintenance of the system, is only one of the contributors of information. The mere fact that the RCMP administers and maintains CPIC does not make the RCMP the source of all information that resides in the system. Only the retrieval of information originally supplied to CPIC by the RCMP can be considered to be "received" from the RCMP. In this case, the information received from CPIC was originally supplied by the local police force itself. As a result, this exemption does not apply. (Orders #M-128, M-363)
- In this case the information entered on Canadian Police Information Centre. was obtained in confidence from the Royal Canadian Mounted Police, Immigration and Passport Branch. As a result, the Commission found that this exemption applied. (Order #M-363)
- Confidential records received by the police from various agencies of the government of Canada, Ontario and the United States were exempt under this provision. The records derived from the Royal Canadian Mounted Police, the Federal Department of External Affairs and the Department of Justice, the ministries of the Solicitor General and the Attorney General in Ontario and United States police agencies. (Order #M-202)







## FIPPA

s.16

DEFENCE

## MFIPPA

No comparable section

A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.







(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where (FIPPA)/if (MFIPPA) the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

TAX INFORMATION

(2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

No comparable section.

CONSENT TO DISCLOSURE

(3) A head may disclose a record described in subsection (1) or (2)

(2) A head may disclose a record described in subsection (1)

if the person to whom the information relates consents to the disclosure.







## ss.(1) - General

- All three parts of the test must be satisfied. The burden of establishing the exemption lies with the party resisting disclosure. (**Orders #36, 42, 69, 80, 87, 91, 101, 179, 203, P-228, P-241, P-246, P-247, P-248, P-251, P-257, P-269, P-270, P-276, P-278, P-284, P-286, P-290, P-293, P-295, P-314, P-318, P-323, P-340, P-359, P-367, P-373, P-385, P-388, P-400, P-408, M-10, M-37, M-65, M-87, M-92, P-418, P-419, P-420, M-91, M-94, P-431, P-435, P-444, P-454, M-130, P-463, P-479, P-480, P-493, P-497, P-489, P-500, M-169, P-512, P-513, P-520, P-522, P-528, P-529, P-531, P-532, M-183, M-185, M-186, M-187, M-188, M-189, M-192, P-545, P-561, P-604, M-231, P-581, P-582, P-584, M-238, M-221, P-576, P-592, M-242, P-605, P-607, P-609, P-610, M-250, M-258, P-627, M-273, M-277, P-641, M-284, M-286, P-668, M-303, P-647, P-653, P-655, P-661, M-288, P-670, M-315, P-677, M-333, P-703, P-697, P-699, P-705, M-335, P-707, P-710, P-711, M-335, P-715, P-719, M-342, M-344, M-345, M-346, P-725, P-728, P-729, P-734, M-364, P-742, P-750, P-765, P-771, P-777, P-779, P-788, M-412, M-430, P-798, P-801, M-424, P-800, P-791, M-420, P-829, M-441, P-834, P-837, P-838, M-531, ( Re Workers' Compensation Board and Mitchinson, Assistant Information and Privacy Commissioner, (1995), 23 O.R. (3d) 31 (Div. Ct.))**)
- Records created by an employee of an institution could not qualify as third party information under this exemption. (**Order #P-441**)
- It is unfair to preclude an institution from relying on a mandatory exemption for records that have been released without its knowledge.(**Order #P-901**)
- A tender submitted to an institution becomes the property of the institution and so is subject to this legislation. This means that the information would be available for access to the public, pursuant to the provisions of the Act. (**Order # M-511**)
- This exemption does not apply to the assessment roll because the Assessment Act places this information in the public domain.(**Order #P-931**)

## ss.(1)--The First Part of the Test--General

- Purchase order numbers do not fit any of the categories mentioned in part one of the test. (**Order #M-531**)
- Land size is not "scientific, technical, commercial, financial or labour relations information." (**Order #87**)



- A list of employers who were required to pay levies or fines under the Workers' Compensation Act is not the kind of information described in the introductory words of this section. (**Order #P-373**)
- Names and addresses of employers held by the Workers' Compensation Board and listed in descending order based on the amount of penalty and the rank in relation to other employers is information that has direct commercial, financial and labour relations effect. This information was exempt because it would reveal third party information by inference. (**Re Workers' Compensation Board and Mitchinson, Assistant Information and Privacy Commissioner, (1995), 23 O.R. (3d) 31 (Div. Ct.)**)

#### **ss.(1)--The First Part of the Test--Trade Secret**

- The Commissioner adopted the definition of "trade secret" from the proposed Trade Secret Protection Act (Alberta, 1986). Section 1(b) states that "trade secret" means information including, but not limited to, a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which (i) is, or may be used in a trade or business, (ii) is not generally known in that trade or business, (iii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The latter test cannot be established by arguing that the record is subject to the Copyright Act because sections 27(2)(i) and (j) of that Act state that the disclosure of records under an access to information scheme is not an infringement of copyright. (**Orders #M-29, M-37, M-65, P-418, P-420, M-94, P-500, P-561, P-707, M-542**)
- A proposal concerning a tender for a Child Care Conversion Project was a "trade secret." The proposal described the necessary features of the valuation process, the important issues to be considered and a methodology to address the issues. The methodology was the description of the manner in which child-care centres would be assessed. The method was contained in the product, which was the provision of business valuation services. The particular business valuation was unique to the third party and had economic value. The third party believed that the proposal would be subject to the non-disclosure terms as set out in the institution's "Request for Proposal." (**Order #P-500**)
- Information concerning the construction of the retractable roof of SkyDome was "trade secret" information that met the first part of the test for this exemption. The records showed unique construction processes and techniques, together with testing procedures, for the roof seals. The information represented an acquired body of knowledge, experience and skill relating to the development of certain techniques, methods and processes unique to the construction of the SkyDome structure. The Commission found that the knowledge base or learning curve, conferred proprietary rights on its owners. The information had economic value and was subject to efforts to keep it confidential. While the information was circulated to a construction management group, it was done so on express terms that it be kept confidential. (**Order #P-561**)



- The contents of a land use permit that authorized a hunting lodge to conduct a bear hunt at a specific camping site cannot be said to be a programme, method, technique or process which is not generally known in the hunting trade. It is not therefore trade secret information. (**Order #P-707**)

#### ss.(1)--The First Part of the Test--Commercial Information

- Information relating to the buying, selling or exchange of merchandise or services is "commercial" information. (**Orders #47, 91, 166, P-394, P-418, P-419, P-420, P-431, P-493, P-582, P-607, P-610, M-258, P-765, P-788**)
- "Commercial" information is distinct from "financial" information. "Commercial" information is information that relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. (**Orders #P-493, P-520, P-531, M-185, M-186, M-187, P-655, M-288, P-661, P-742**)
- The characterization of the information must be derived from the content of the record, rather than from the motives of the requester. Information about government programs, which supports the drawing of inferences about commercial activity that is related to those programs, is not itself "commercial information." (**Order #179, P-318**)
- Information does not qualify as "commercial" information simply because it is contained in a business or commercial proposal. As a result, in this case a copy of a landfill gas utilization proposal submitted by a named company did not qualify as "commercial" information. (**Orders M-185, M-186, M-187**)
- Minutes of board meetings do not automatically qualify as "commercial" information solely because the board is engaged in commercial activities. Records that indirectly relate to the business of marketing a product, such as updates about meetings of other marketing boards, discussions of lobbying efforts and seminars attended by board members are not "commercial" information, while accounts of negotiations for the sale of the product and updates of pricing and sales statistics are "commercial" information. Generalized references to government programs or customs issues are not "commercial" information. (**Order #P-400**)
- Records do not contain "commercial" information under this section simply because they were purchased from the affected party. (**Order #M-29**)
- The names of agencies that are alleged to have engaged in illegal practices cannot be characterized as "commercial" information as contemplated by this provision. (**Order #P-340**)



- A proposal developed by a school board in conjunction with Apple Canada Inc. for an advanced technology secondary school was not "commercial" information. (**Order #M-65**)
- A market research study that investigated the economic feasibility of developing a particular commercial operation is "commercial" information. (**Orders #41, P-222**)
- Any information that would disclose that an application was made for listing a new product in the Drug Formulary constitutes "commercial" information. (**Order #68**)
- Records referable to product information regarding pricing and market considerations is "commercial" information. (**Orders #47, 70, 101, 166 P-246, 269, P-367**)
- The mailing list of dairy producers is "commercial" information. The Ontario Milk Marketing Board (OMMB) is a commercial organization, and the mailing list is a valuable asset in relation to the sale of advertising space in the OMMB's magazine. (**Order #76**)
- Information regarding the sale of land is "commercial." (**Orders #87, P-251**)
- Contracts for the purchase of open and secure custody, and detention services and programs are "commercial" information. (**Order #91**)
- Records that relate to the sale and purchase of goods and that outline a party's offer to supply an institution with products for specified unit prices contain "commercial" information. (**Order #P-408**)
- Tender documents that describe communications strategies contain "commercial" information. (**Orders #P-418, P-419, P-420**)
- Records related to negotiations between a mining company and two First Nations bands contained "commercial" information. The information included details of a commercial undertaking between the parties. (**Order #P-512**)
- In this case, the disclosure of the amount of electricity purchased by Hydro from the affected party would reveal the affected party's sales figures. As such, the information was "commercial" in that it related to the buying, selling or exchange of merchandise or services. (**Order #P-531**)
- The Commission determined that a proposal from a non-profit federation regarding the licensing of hair stylists in Ontario contained "commercial information." The proposal described the proposed structure, operation and maintenance of a process for the self-regulation of the hairstyling trade and contained information about the type of services and the manner in which the federation would provide these services to its members under a scheme of self-regulation of the profession. (**Order #P-742**)



- The list of respondents to a survey related to the expansion of Seneca College of Applied Arts and Technology as part of market research is not "commercial information." The Commission noted that the term "commercial information" is to be given specific and narrow interpretation and that while market research might fall within the definition in certain cases, the list of respondents to this survey did not. (**Order #P-788**)
- The list of respondents to a survey related to the expansion of Seneca College of Applied Arts and Technology as part of market research is not "commercial information." The Commission noted that the term "commercial information" is to be given specific and narrow interpretation and that while market research might fall within the definition in certain cases, the list of respondents to this survey did not. (**Order #P-788**)
- The pricing structure of a liquor product sold by the LCBO including the price paid by the Liquor Control Board of Ontario (LCBO), insurance and freight costs, taxes and profit margin and mark-up is commercial information. (**Order #P-905**)
- Notices, which are governed under the Tree Act, contain commercial information. (**Order #M-522**)

#### **ss.(1)--The First Part of the Test--Financial Information**

- Financial information refers to specific data (**Order #80**), and is information that relates to finance or money matters. (**Orders #47, P-607, P-610**)
- The price paid for land, tax information, conversion rates, default consequences and interest incentives regarding loans are "financial information." (**Orders #87, P-251**)

#### **ss.(1)--The First Part of the Test--"Commercial" and "Financial"**

- The unit pricing information contained in a tender bid constituted financial and/or commercial information. (**Order #166**)
- The price of a contract entered into by the institution and a certain affected person is either "commercial" or "financial" information. (**Order #P-489**)
- The disclosure of records that contain a description of the work done or services rendered by a third party or its subcontractors and the corresponding prices and charges in connection with the demolition of a building would reveal commercial or financial information. (**Order #M-192**)

#### **ss.(1)--The First Part of the Test--Scientific Information**

- Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, it must relate to the observation and testing of specific hypotheses or conclusions and be undertaken by an



expert in the field. Finally, scientific information must be given a meaning separate from "technical" information in this provision. The Commission found that historical research did not contain "scientific" information. (**Orders #P-454, P-463, P-545**)

**ss.(1)--The First Part of the Test--Technical Information**

- Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. "Technical" information is distinct from "scientific" information. The historical research in these documents is not "technical" information. (**Orders #P-454, P-463, P-479, P-561, P-582, P-610**)
- Consultants' reports, the work programs and schedules and the interoffice memoranda prepared by the institution in relation to a development proposal were "technical" information. The records contained analyses of the consultants' reports and comments on the proposal and thus contain technical information. (**Order #M-149**)
- A pay equity matrix chart and its accompanying manual contain technical information. (**Order #M-37**)
- A consulting engineer's report, indicating structural features of a school, relating to asbestos and fire safety, is "technical information." (**Order #3**)
- Information regarding boundary negotiations is not "technical information." (**Order #69**)
- Building size, construction schedule, quality control, production per person hour and budgets are "technical information." (**Order #87**)
- The structure of the proposal of a bid, the research design, phasing, study process and costing structure is technical and commercial information. (**Order #P-222**)
- Records submitted to the Ministry of the Environment in response to a control order issued under the Environmental Protection Act contain "technical information." The records contained information related to the processes, equipment, and plans required to prevent or alleviate effects of the discharge of contaminants into the natural environment and reports outlining the steps taken and the results achieved to meet the requirements of the control order. (**Order #P-513**)
- Records containing environmental testing and analysis of a property are "technical information." (**Order #P-584**)
- Building plans comprised of architectural, merchandising, structural, mechanical and



electrical configurations of the facilities of proposed tenants of a property development which were submitted by a developer to a municipality for review prior to issuing a building permit under the Building Code constitutes "technical information". (Order #M-520)

- A report containing information which is the result of a technical study by staff of a firm of consulting engineers with expertise in the field of environmental testing and analysis was found to be scientific and technical information (Order #P-974)
- Drawings and specifications provided by a licensed professional engineer in support of an application for a building permit regarding proposed renovations to a barn is technical information. (Order #M-542)

**ss.(1)--The First Part of the Test--"Scientific" and "Technical"**

- Where a member of the Ontario Federation of Anglers and Hunters wrote letters on behalf of the Federation and not in the capacity of an expert, the letters did not contain scientific or technical information. This factor, together with the lack of scientific and technical content of the letters, resulted in this exemption not applying. (Order #P-545)

**ss.(1)--The First Part of the Test--Labour Relations**

- Training grant information is "labour relations." (Order #87)
- An investigation of an alleged incident at a child-care centre is not labour relations information. (Order #121)
- The phrase "labour relations information" refers to information concerning the collective relationship between an employer and its employees. This would include information compiled in the course of the negotiation of pay equity plans which, when implemented, would effect the collective relationship between the employer and its employees. However, the "Application for Review Services" form and notes regarding meeting dates and names and positions of employee/employer representatives would not be included in what is termed "labour relations information." (Orders #P-653, M-315, P-715)
- Information about an individual requester does not deal with collective employee\employer relations. As a result, this exemption does not apply. (Order #M-315)

**ss.(1)--The Second Part of the Test--Supplied**

General

- The term "supplied" must be differentiated from the term "obtained." Inspection reports contain judgments made by government inspectors on what they themselves observed and



therefore the information is not "supplied" by the third party. As well, sample answers to a test that were developed by an institution are not "supplied" by a third party. In order to satisfy this part of the test, the information must have been supplied to the institution by a third party which, by definition, is not part of the institution. (**Orders #16, 53, 122, P-257, P-348, M-183, M-572**)

- It is plausible to interpret ss.(1) as being applicable to information generated by an institution which will, if disclosed, permit the drawing of accurate inferences with respect to the nature of confidential commercial information that has been supplied by a third party to the institution. As well, ss.(1) could include information supplied by parties other than the persons opposing disclosure. (**Orders #179, 203, P-218, P-219, P-228, P-241, P-246, P-247, P-346, P-385, P-388, P-435, P-472, P-479, P-480, P-493, M-183, P-529, P-531, P-545, M-36, P-581, P-604, M-242, P-609, M-277, P-655, M-288, P-661, P-677, P-765, M-574**)
- While, in general, the fees to be paid for services are negotiated, in this case, the Commission ruled that the invoices provided to the institution for services rendered were "supplied" for the purposes of this exemption. (**Order #M-258**)
- To satisfy the "supply" part of the test, it is not necessary to show that the record itself was supplied to the institution. The test will be satisfied if it can be shown that information contained in the record was originally supplied to the institution. Where an intergovernmental memorandum contained the details of a project, which were submitted to the institution via the third party's proposal, the disclosure of the information would permit the drawing of accurate inferences regarding the information actually supplied to the institution. (**Orders #P-393, P-493**)
- In order to meet this part of the test, the information contained in the record at issue must be one and the same as that originally provided to the institution for the purpose of creating the record. (**Orders #87, 179, 203, 204, M-273**)
- Although there is no general provision in the Workers' Compensation Act which provides that employer compulsory return forms are confidential, the forms are marked "all information is strictly confidential". Therefore, names and addresses derived from information in these forms was supplied in confidence. (**Re Workers' Compensation Board and Mitchinson, Assistant Information and Privacy Commissioner, (1995), 23 O.R. (3d) 31 (Div. Ct.)**)

#### Not Supplied

- The contractual information was not "supplied" by the affected party as envisioned by this exemption because it was developed as a result of negotiations. Therefore, while certain information was "supplied" in order to enter into the negotiations, the final product, the contract, did not contain the same information and was not "supplied" by the third party. (**Orders #87, 179, 203, 204, P-219, P-228, P-241, P-248, P-251, P-263, M-36, P-385,**



**P-388, P-394, P-489, M-183, P-581, M-242, P-609, M-258, M-277, M-335, P-710, P-834, M-441, M-574)** Also, where the final contract price entered into between an institution and a third party reflects a compromise position that is arrived at through the process of negotiation, the "supply" part of the test cannot be met. (**Order #P-489**)

- The Commission was not satisfied that information in an agreement entered into by a corporate property owner and the Ministry of Environment and Energy to clean up the soil in the area was "supplied" by the property owner. The terms and conditions in the agreement were negotiated between the parties. (**Order #P-609**)
- An appendix to a contract, which contains the terms of reference and job description for the position, was, in the Commission's view, created by the institution to outline the specific services that it wished to obtain. As a result, the information in the appendix was not supplied to the institution and this exemption did not apply. (**Order #M-277**)
- A record containing penalties and surcharges imposed on employers under the Workers' Compensation Act is not "supplied" by the third party employers. This is so even though information supplied by the employers is used to calculate the surcharges. It is not possible to calculate the actual information provided by the employers from the surcharge amounts themselves. (**Order #P-373**)
- Information that is possessed by the institution only as a result of the function of the institution under the Municipal Boundary Negotiations Act is not "supplied" by a third party. (**Order #69**)
- Records disclosing amounts paid by an institution to consultants are not "supplied" by the consultants; these payments are determined by the institution. As a result, this exemption is not applicable. (**Order #P-247**)
- Records are not supplied to an institution where they are created as a result of a joint meeting between the institution and third party. (**Order #P-270**)
- Information that is the result of negotiations is not "supplied" even though some of the information originated with the third party. Where it is not possible from a review of the records to determine which information was supplied by the third party, which information originated from the institution and which information is a result of negotiations, the second part of the test cannot be met. (**Order #M-65**)
- Agreements signed by councillors and employees of an institution cannot be "supplied" to the institution because these individuals are part of the institution. (**Order #M-183**)
- Information collected by the Ministry of Health, through inspections carried out under the Nursing Homes Act, is not "supplied" by the third party. (**Order #P-444**)
- A sexual harassment complaint made by an employee of an institution about another



employee of the institution is not "supplied" by the complainant. The complaint was investigated by an employee of the institution and the information could not be considered "supplied" by a third party. (**Order #P-549**)

- Correspondence between a company and the Metro Toronto Convention Centre regarding the Centre's expansion was not exempt under this provision. The information in the records reflected the terms negotiated between the parties not information supplied by the company to the Convention Centre. (**Order #P-801**)
- Information pertaining to amounts budgeted for contract payments was not "supplied" because it is merely the institution's budget amount committed for payment. (**Order #M-531**)

#### Was Supplied

- Where during an inspection information is obtained from the third party's records without any interpretation by the inspector, the information is "supplied" by that third party. (**Order #P-359**)
- Information may be "supplied" where it is provided under a statutory requirement. (**Orders #P-314, P-365, P-400**)
- Technological developments that may result in the networking of computer and electronic data systems between government institutions and private industry should not preclude a business organization from arguing that it "supplied" information to the government. In this case, Hydro obtained readings from its meters by using a computer modem, which electronically transmits the readings. The issue is whether the information was communicated to the government institution by a third party as opposed to being generated or created by the government institution itself. As a result, the "supplied" test was met. (**Orders #P-531, P-607**)
- The Review Officer of the Pay Equity Commission does obtain information supplied by the parties to a negotiation of a pay equity plan. As well, the Job Evaluation System and Gender-Neutral Comparison System and Terms of Reference of the Pay Equity Committees was supplied by the parties to the negotiation. (**Order #P-653**)
- A contract may be supplied to an institution where the institution is not a party to the contract. Here, the Art Gallery of Ontario and a foundation had entered into contractual agreements regarding an exhibition and the contract was provided to the institution, the Ministry of Culture, Tourism and Recreation. As such, the record was supplied to the institution. (**Order #P-728**)
- Applicants for Ontario Film Development Corporation (OFDC) loans 'supply' the dollar amount of the loan to the OFDC. In most instances, that identical amount is provided where the loan is approved. (**Order #P-729**)



- Where an agreement is not made as a result of negotiation, as where it is a "single source" contract, and where the disclosure of the terms of the agreement would disclose the same information provided by the third party, this exemption applied. Moreover, in this case the third party was able to establish that the terms and conditions were developed solely for the institution and that they are not standard in the industry. (Order #P-807)
- Inducements in a leasehold agreement which prompted the institution to select the landlord's property were held to have been "supplied" to the institution. The Commission found that the inducements were not negotiated; rather, they were supplied by the landlord at his or her own initiative. (Order #P-829)
- Information which is submitted in Notices, which are governed by the Tree Act, are supplied to the institution (Order #M-522)
- An agreement was held to be supplied by a third party where it contained identical information as was supplied in the course of negotiations for the agreement. (Order #M-574)
- While former employees of an institution may be considered as third parties for the purpose of this section, the Commission found that their interests may best be addressed under the privacy provisions of the Act. (Order #M-596)
- Through the introduction of its evidence at an arbitration, the affected party, a corporation, made available to Hydro and the arbitration panel information which was included in the arbitrator's decision. Therefore, technical, commercial and financial information contained in an arbitration decision was "supplied" to Hydro, the institution, by a corporation. (Order #P-1000)

#### ss.(1)--The Second Part of the Test--"To the Institution"

- The second part of the test contemplates that the information must be supplied in confidence to the institution. (Order #P-263)

#### ss.(1)--The Second Part of the Test--"In Confidence"

##### General

- The expectation of confidence must be reasonable and have an objective basis. The following factors may be considered: 1. was it communicated that the information was to be kept confidential; 2. was it treated consistently in a manner that shows concern for its protection prior to being communicated to the institution; 3. is it otherwise available to the public; and 4. was the record prepared for a purpose that would not entail disclosure. Where records are already in the public domain, it is very difficult to assert that the harms contemplated in this provision will arise. In this case, the building plans were available to



the public for viewing at a City office and as a result, the exemption did not apply.  
(**Order #P-561, P-829, M-542**)

- Since the Copyright Act will not be violated by reproducing records for the purposes of freedom of information statute, an institution may not refuse to grant access to a record in its custody or control solely on the basis of a copyright claim. The fact that a record is subject to copyright does not, in itself, indicate confidentiality. (**Order #M-37, M-542**)
- Simply asserting that information was supplied "in confidence" is not adequate. There must be evidence produced to support the assertion. Where records were supplied in a "spirit of co-operation," and were not required to be supplied by law, the confidentiality test was not made out. (**Orders #47, 65, 113, 125, P-257**)
- In order to satisfy this part of the test, it is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable and must have an objective basis. (**Orders #M-169, M-250, P-668, P-655**)
- It is not sufficient that the supplier of the information have an expectation of confidence; the expectation must be reasonable and must have an objective basis. In this case, the reasonable expectation of confidence was temporary, until a consultant's report was released for public consultation. Given that this had not occurred, the "in confidence" part of the test was met. (**Orders #M-188, M-189**)
- Confidentiality must be established by evidence, either in the process, or explicitly, in a contract. A contract that does not specifically state that the institution cannot disclose information does not satisfy the confidentiality requirement. (**Orders #70, 101**)
- Confidentiality was implicit where a third party could establish that it had a long-standing corporate policy regarding the secrecy of its pricing structure. (**Order #P-293**)
- A company's efforts to guard the confidentiality of records in other contexts can support the "in confidence" test. (**Order #P-246**)
- Where records are provided to an institution pursuant to a statutory requirement, they are not, in general, provided "in confidence." (**Order #P-257**)
- In this case, the "in confidence" test was met implicitly even though the records were provided in respect of a hearing before a tribunal, which had a practice of making full disclosure to the parties to the proceeding during informal mediation. (**Order #P-295**)
- Information that has been made public is not confidential. Land transfer tax information is a matter of public record and is, therefore, not confidential. To be confidential, information must be supplied "in confidence" and consistently be treated in a confidential manner. (**Orders #87, 113**)



- Information available to interested parties and the general public before the Act was in force cannot be supplied "in confidence." (**Order #53**)
- Where the information had been disclosed through debates in the House of Commons and in the Ontario Legislature, this part of the test cannot be met and the information must be disclosed. (**Order #P-286**)
- Past publication of information puts into question any argument that it was supplied "in confidence." However, the fact that institutions provide information to the Provincial Auditor does not destroy the confidentiality of records, if they were originally supplied in confidence. (**Order #48**)

#### "In Confidence" Test Met

- This part of the test was satisfied regarding the disclosure of unit prices quoted by the successful bidder for a construction project. While the institution stated that the information was not supplied in confidence, the Commission's Appeals Officer found that the unit price portion of the tender packages were not disclosed at the public opening of tender bids and that this information was treated as confidential. (**Order #M-250**)
- Where an institution's tender process provides for sealed bids and for the non-disclosure of competing tenders, the "in confidence" test is met. (**Order #P-367**)
- The "in confidence" test is satisfied in respect of records provided by trust companies during the regulatory process under the Loans and Trust Corporations Act. (**Orders #P-314, P-480, P-661**)
- Information in a report may implicitly be "supplied in confidence," if the report is received in camera and not disclosed to the public. (**Orders #3, 65**)
- Written correspondence that establishes confidentiality satisfies the test. (**Orders #76, P-246**)
- Material provided as a result of a sealed tender is confidential where the written policy of the institution stipulates that confidentiality (subject to the Act) would be maintained. (**Orders #166, P-367, P-520**)
- The minutes of a board meeting were supplied implicitly "in confidence." The institution stamped the records "confidential" on receipt and the submissions of the institution and the board confirmed that confidentiality was expected given a long-standing practice ensuring that only certain individuals saw the minutes. (**Order #P-400**)



- Unit price information was implicitly provided "in confidence" by bidders in a tender because the institution told all suppliers in an open meeting that the information would be treated confidentially. This was also the institution's past practice and policy. (**Order #P-408**)
- The "in confidence" test was met where the terms of a Letter of Intent stated that it and any agreements entered into between the institution and the company regarding proposed renovations were to be kept in the "strictest of confidence." (**Order #P-472**)
- Where representations and sworn affidavits indicate that the affected parties supplied information to the institution "in confidence," the test was met. (**Order #M-145**)
- An informal submission regarding a proposed development application was implicitly supplied to municipal officials "in confidence." An informal submission was distinct from a formal development application made under the Planning Act. In submitting an informal application, the developer is looking to the City for guidance and assistance in formulating the application. The City's response to the documents contain analyses of the information contained in the documents and, as such, the disclosure of the response would permit the drawing of accurate inferences of the nature of the proposal. (**Order #M-149**)
- The "in confidence" test was met where the institution's guidelines for air carriers stipulated that any information supplied by an air carrier in an offer was supplied in confidence. As well, the head of the institution, in public meetings, had given assurances that all information supplied for the purposes of bidding for air ambulance services were confidential. (**Order #P-497**)
- The institution's Request for Proposals, in respect of a tender, explicitly provided that all bidder responses would be considered confidential. It applied to reports prepared by the successful bidder in the course of carrying out its contract. As a result, this part of the test was satisfied. (**Order #P-500, M-572**)
- Records supplied to the Ministry of the Environment in response to a control order issued under the Environmental Protection Act are supplied implicitly "in confidence." (**Order #P-513**)
- Where a mining company approached the Premier and the Minister of the Ministry of Environment and Energy directly regarding a mining development project, the records were provided to the ministry implicitly "in confidence." The records were provided as a brief for discussion purposes and were not a project report or a definitive environmental study. (**Order #P-512**)
- Tender documents may be supplied explicitly "in confidence" where written documentation, such as policies or procedures governing the bid process, indicates that there was a reasonable expectation of confidentiality at the time the information was supplied. The fact that there is no reference to confidentiality in the manual does not mean



that the records were provided implicitly "in confidence." (**Order #P-520**)

- The amount of electricity purchased by a company at a landfill site was supplied by the company to Ontario Hydro implicitly in confidence. Ontario Hydro established that all matters pertaining to Non-Utility Generating projects were confidential. During the negotiating phase, Hydro does not acknowledge the existence of the project. Once it is signed, it is discussed only in limited detail with consent and only to entities that have a legal right to the information. (**Order #P-531**)
- Information provided by an affected party's counsel to investigators during an Ontario Securities Commission investigation was implicitly "supplied in confidence." In these circumstances, the affected party understood that the information would remain confidential. (**Order #P-583**)
- Information about environmental testing and analysis of a property voluntarily provided to the Ministry of the Environment and Energy by a private company was supplied implicitly "in confidence." In cases where the contamination of the environment is not "grave," it was the policy of the ministry not to disclose more than a summary of the information to the public. (**Order #P-584**)
- Corporate consumption of Hydro services was supplied in confidence implicitly. All information supplied to Hydro was kept in strict confidence and used for rate purposes only. The Commission was satisfied that there was a long-standing policy that third party information regarding its business relationship with Hydro was not divulged to any other party. (**Order #P-607**)
- In labour relations, it is normally the practice that where an impartial third party is performing services analogous to those of a mediator or conciliation officer, any information supplied by a party is not disclosed without the consent of the supplying party. Therefore, information supplied to the Pay Equity Commission or its Review Officer is implicitly supplied in confidence. (**Order #P-653**)
- Certain tender information was supplied in confidence implicitly where the institution provided sufficient evidence to the Commission that it had always been its policy and practice to treat unit price quotations as confidential. As well, the Commission accepted that performance bonds/letters of credit had always been received by the institution in the strictest of confidence as the documents may contain a great deal of financial information. (**Order #M-288**)
- Information relating to a company's proposed location for a laboratory or a specimen collection centre was provided to the Ministry of Health implicitly in confidence. The Laboratory and Specimen Collection Centre Licensing Act (the Act) provides a complete scheme for the licensing and regulation of laboratories in Ontario. While the Act does not contain a confidentiality clause that might assist in determining this matter, the information supplied to the Commission by the company established that the location of these



proposed sites was competitive information of value within the industry. As well, information about the financial position of the company, which was not a public company, was not ordinarily available and was supplied implicitly in confidence. (**Order #P-655**)

- Information supplied by privately held corporations to the Ontario Securities Commission, in respect of statutory reporting requirements for registrants, is provided implicitly in confidence. (**Order #P-690**)
- Where an "Application for Anti-Racism Operational Funding Program" contained ss.(3) [FIPPA] \ ss.(2) [MFIPPA] as a condition, though in small print, the Commission found that the 'in confidence' test continued to be met in respect of certain parts of the application. This provision uses the term "may" and it was determined that the institution had not taken sufficient steps to bring the significance of the provision to the attention of the organization applying for funding. (**Order #P-777**)
- A contract which contained unique terms that were provided and developed solely by the third party for use in the agreement with the institution, the Commission found that there was an implicit expectation of confidentiality. (**Order #P-807**)
- Records related to proposals for grants awarded under the Ministry of Citizenship's "Anti-Racism Operational Funding Program" were supplied to the institution in confidence. Despite the fact that the application for funding contained a condition that authorized disclosure under s.17(3) [FIPPA] \ s.10(2) [MFIPPA], the Commission found that applicants did not fully understand this. (**Order #P-800 and see contra below Order P-829 where the Commission held that a comparable clause was applicable and understood in a corporate context.**)
- Building plans submitted by a developer to a municipality for review prior to issuing a building permit under the Building Code were held to be supplied in confidence when it was found by the Commissioner that it was not the practice of the municipality to make building plans ordinarily available to the public. (**Order #M-520**)
- Agreements for financing a building by a township were held to be confidential. (**Order #M-574**)
- A corporation's technical, commercial and financial information which was contained in the decision of an arbitration panel was "supplied in confidence" when the information contained in the decision was provided in the private confidential form of an arbitration. (**Order #P-1000**)

"In Confidence" Test Not Met

- The names and addresses of the employers governed by the Workers' Compensation Act are not supplied "in confidence." (**Order #P-373**)



- Certificates of Approval, and their Amendments, issued under the Environmental Protection Act are public records and as such they are not supplied "in confidence." Subsequent disclosure of information that was originally supplied "in confidence" may be addressed under the "harms" part of the test. (**Order #P-479**)
- In this case, all applications for special event permits where alcohol is to be served are considered by the Neighbourhoods Committee in a public meeting. The Commission ruled that in these circumstances applicants would expect that the application and the enclosed information would not be provided "in confidence." (**Order #M-169**)
- Records concerning a company hired by a City to demolish a building were not provided to the City in confidence. There was nothing on the face of the invoices and letters from the company or in its submissions to indicate that confidentiality was implicit or explicit. (**Order #M-192**)
- The contents of a letter of intent entered into between SkyDome and private companies was a binding agreement which was negotiated between the parties. Therefore, the contents of the letter of intent were not "supplied" to SkyDome as this exemption contemplated. (**Order #P-581**)
- This part of the test was not met where invoices for investigation services were provided to an institution. The Commission did not accept that the invoices were subject to solicitor-client privilege and ruled that any expectation of confidentiality related to the subject matter of the investigation and not to the invoices themselves. (**Order #M-258**)
- The Commission ruled that the disclosure of the name and address of the bank that a particular company does business with was accessible under the Act. The company could not establish that the information was supplied to the institution in confidence. (**Order #P-668**)
- Where information is publicly available through corporate searches, it cannot be said that it was supplied to the institution in confidence. (**Order #P-677**)
- The fact that the amount of rent paid by the Ontario Science Centre to a third party company was not known by the centre personnel, other than senior officials, or that similar information was not made public in the past does not mean that this part of the test is satisfied. The Commission found that the company's expectation of confidentiality was not reasonable since it did not have an objective basis. (**Order #P-687**)
- Where the third party is not able to point to any evidence of confidentiality and where the institution was prepared to disclose the record, the Commission concluded that the institution did not consider the record to be supplied in confidence. (**Order #P-734**)
- A draft proposal provided to an institution was not provided "in confidence." The Commission noted that it was not explicitly supplied in confidence and that sufficient



evidence was not provided to determine that the proposal was implicitly provided in confidence. **(Order #P-742)**

- The records relevant to an inspection of a recycling company by the Ministry of the Environment and Energy were not supplied to the institution in confidence. The company submitted that the Certificate of Approval process was confidential, but the Commission held that there was no evidence to support that assertion and that the information did not reveal the processes or site and recycling plans of the company. **(Order #P-765)**
- A clause in a leasehold agreement that stated that the landlord "acknowledges, agrees and consents to the release by the Tenant of this Lease and any information contained herein" was sufficient for the Commission to find that the "in confidence" part of the test was not met. The Commission also noted that two senior executives of the landlord's real estate corporation as well as the Director of the institution's leasing services branch signed the lease. As such the agreement was signed by a sophisticated commercial lessor. **(Order P-829 and see contra above P-800 where a similar clause was held not to vitiate confidentiality in the context of a contract for public funding.)**
- The "in confidence test" was not met when information was supplied by companies further to the requirements of the institution, which they enacted under the County's Tree By-Law, which was authorized by the Trees Act. The IPC came to this conclusion because there was no indication in the By-law or the notices themselves that the supplied information will be considered confidential. **(Order #M-522)**
- A city by-law which prohibited any elected or appointed official from divulging any but the total price of public tenders supported a reasonable expectation of confidentiality with respect to unit prices. **(Order #M-531)**
- Drawings and specifications provided by a licensed professional engineer in support of an application for a building permit were not supplied in confidence in the absence of any evidence of assurances of confidentiality provided by the municipality, or in the absence of any evidence that the drawings had been consistently treated as confidential. **(Order #M-542)**

#### **ss.(1)--The Third Part of the Test--Harms**

- The Commission confirmed that reasonable expectation of harm required that the institution establish a clear and direct linkage between the disclosure of the information and the harm alleged. The Commission approved of the position taken by the Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture) [1989] 1 F.C. 47 at 59-60, where the Court indicated that a "reasonable expectation of probable harm" was required. It also approved of the Federal Court Trial Division's decision in The Information Commissioner of Canada v. The Prime Minister of Canada, unreported, November 19, 1992, where the Court stated that the mere "possibility" of harm was not sufficient. The Court held that descriptions of possible harm, even in substantial detail, are



insufficient in themselves. Justice Rothstein stated that:

The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantial the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a Court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged...While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality, would...be more difficult to satisfy.

**(Orders #P-534, P-576, P-779)**

- The institution or a third party must present evidence that is detailed and convincing and must describe a set of facts and circumstances which would lead to a reasonable expectation that harm would occur if the information is released. Generalized assertions of fact in support of what amounts to speculation of possible harm do not satisfy the requirements of this part of the test. According to **Orders #87 and P-528**, where information is available from a source to which the public have access, there can be no reasonable expectation of harm from the disclosure. (**Orders #36, 47, 49, 70, 87, 101, 125, P-269, P-286, P-294, P-314, P-323, P-356, P-385, P-408, P-419, M-65, P-431, P-435, P-479, P-480, P-493, P-529, P-528, P-531, P-545, P-561, P-576, M-258, M-284, P-771**)
- An engineering company that provided a report to a municipality regarding whether the underground parking of a building complied with certain by-laws did not provide adequate evidence that the disclosure of the report would significantly interfere with contractual or other negotiations. The fact that a negative interpretation of the report might affect present or future clients was not sufficient. (**Order #M-10**)
- The fact that the information contained in the records is dated is a factor in determining whether the "reasonable expectation of harm" part of the test has been met. (**Order #P-286**)
- The onus is on the institution or affected third party to demonstrate that the harm envisioned by the section is present or reasonably foreseeable. (**Orders #3, 42, 48, 65, 101, P-228, P-249, P-290, M-10, M-29, M-286**)
- It is unlikely that the disclosure of a "standard" clause in a contract could reasonably be expected to result in the types of harms contemplated by this exemption. (**Order #P-251**)



- The fact that records may be negatively interpreted, if disclosed, is not sufficient to satisfy the harms test. (**Order #P-373**)
- The harms tests in ss.(1)(a), (b) and (c) were not met in respect of parts of a tender related to the construction of a non-profit housing development. The Commission ruled that the names and addresses of the contractors, the total value of the bids, the list of proposed subcontractors, and other general information contained in the bid, would not result in the harms contemplated by these sections. (**Order #P-610**)
- The harms test in ss.(1)(a), (b) and (c) were not met in respect of parts of background material relating to a decision to make a monetary grant to a named organization as part of a ministry's Anti-Racism Operational Funding Program. The Commission found that disclosure of the funding sources of organizations applying for such grants would contravene ss.(1)(a). It also held that public disclosure would not mean that groups would no longer supply this information to the institution, according to ss.(1)(b). (**Order #P-777**)
- Disclosure of portions of an engineer's report on the structural condition of a building was not subject to the harms in these provisions. While the report did contain technical information that was supplied implicitly in confidence, it could not be said that, if disclosed, the third party would not provide information of this nature in the future, since the City has the authority to obtain reports of this nature in its inspection of buildings. The fact that there may be litigation resulting from the disclosure did not satisfy the harms test. (**Order #M-303**)
- Records containing the budget and operating costs of a named ambulance service was exempt under this provision. The information is supplied to the Ministry of Health in confidence in order for the ministry to determine funding for approved operational expenses. The Commission was satisfied that one of the harms in this provision would result if the information was disclosed and that union\management negotiations would be adversely affected. (**Order #P-711**)
- The Commission ruled that the disclosure of a contract between the Art Gallery of Ontario and a foundation for the exhibition of certain works of art would not result in the harms enumerated in this section. The institution had not shown sufficient connection between the disclosure of the contract and these provisions to satisfy the test for this exemption. (**Order #P-728**)
- A reasonable expectation of harm would result from disclosing the pricing structure of a liquor product sold by the Liquor Control Board of Ontario (LCBO) since disclosure could reasonably be expected to result in other customers applying pressure on the supplier to provide price concessions similar to those which the supplier gave the LCBO. (**Order #P-905**)
- The Divisional Court approved the position taken by the Federal Court of Appeal in



Canada Packers Inc. v. Canada (Minister of Agriculture) [1989] 1 F.C. 47 at 59-60, where the Court indicated that a "reasonable expectation of probable harm" was required. There need only be evidence of a reasonable expectation of probable harm which of necessity involves some speculation. (**Re Workers' Compensation Board and Mitchinson, Assistant Information and Privacy Commissioner, (1995), 23 O.R. (3d) 31 (Div. Ct.)**)

ss.(1)(a)

Test Not Met

- A lease that contained information which could be used by competitors to develop similar projects was not exempt under this provision. No specific information was given to indicate that this test was satisfied. (**Order #P-356**)
- Where the release of documents would disclose matters that have already been made available to the public, this provision may not be used. (**Orders #87, P-323**)
- A tender submission was not exempt where it was alleged that its disclosure would reveal the expertise of the staff of the tendering company and would thereby encourage other companies to "raid" the staff. These assertions were speculative and the records were therefore not exempt under this provision. (**Order #P-418**)
- The mere fact that the institution retained the affected person to provide a collection of research materials, together with editorial comments, is not sufficient to satisfy this provision. The Commission was not persuaded that the ability of the researcher to undertake future research would be hampered because the information could be misconstrued or taken out of context. (**Orders #P-454, P-463**)
- The disclosure of minutes of certain board of directors' meetings cannot be exempt under this provision where the harm is to the institution and not a third party. Harm to the institution is properly dealt with under s.18 [FIPPA] \ s.11 [MFIPPA]. (**Order #P-487**)
- The scheme of the Act contemplates that harm to the competitive or financial position of an institution should be addressed by a claim for exemption under s.11 [MFIPPA] \ s.18 [FIPPA] of the Act and not this section. (**Order #M-286**)
- In this case, the Commission ruled that this exemption did not apply to budget files, including budget submissions and annual financial statements of a named day-care centre. Where collective agreement negotiations are over, the Commission stated that it would be very difficult to make the argument that this harm could be satisfied based on the disclosure of the records. In respect of competitive information, in order to establish that disclosure of financial information could prejudice competitive position, detailed and convincing evidence must be provided that would represent significant prejudice. The Commission ruled that where the information is obtained for the purpose of distributing public funds among the providers of a particular service, the inference is even more difficult to draw. Therefore, the need for detailed evidence is greater. (**Order #M-284**)



- The Commission noted that accounting firms will continue to provide detailed information to government institutions when they are retained to perform forensic accounting work. While it is important that accounting firms share as much information as possible with the institutions that retain them, the firms will continue to provide cost-related information if they wish to secure government contracts. Therefore, the Commission held that the disclosure of this information would not result in less information being available in the future. **(Order #P-710)**
- Financial information about litigation settlement negotiations is not exempt under this provision. The Commission held that the institution failed to establish that the disclosure of the financial information contained in the record would give rise to a reasonable expectation of significant interference with future negotiations between itself and other individuals. **(Order #P-715)**
- This provision was not satisfied in respect of a request for service contracts, together with standard form tender documents, entered into between GO Transit and suppliers of vending machines located in GO Transit stations. At issue was access to the percentage rents or rates of commission paid by the suppliers to GO Transit, a list of other locations serviced by each supplier and the name and address of the supplier's bank reference. The Commission found that disclosure of this information would not prejudice competitive positions in up-coming tenders or otherwise. **(Order #P-779)**
- An institution failed to satisfy the third part of the test when it simply repeated the wording of the Act, without describing how or why disclosure of the record could reasonably be expected to result in the harms described. **(Order #M-542)**
- Since the Agency is no longer in business as a collection agency and the licence is revoked, the Commission did not accept the Agency's position that harm could occur if the bank account numbers were released. **(Order #P-952)**

#### Test Met

- Disclosure of specific financial information relating to the company's capitalization, including budget statements and refinancing arrangements, could prejudice its current competitive position and its relationship with other parties. **(Order #P-286)**
- Release of information relating to the broad corporate strategies and projected financial, commercial and research activities of a third party could reasonably be expected to significantly prejudice the company's competitive position. This rationale does not apply to information specifically related to a takeover, which is historical in nature and not sufficiently connected to ongoing corporate operations to satisfy the harms test. **(Order #P-293)**
- The affected third party was able to identify a reasonable expectation that disclosure of the information would result in a significant prejudice to its competitive position. Therefore,



the harms test was met. (**Orders #47, 113, P-219, P-222, P-246, M-572**)

- Mere knowledge of an application for a new drug listing could, in itself, result in the type of harm enunciated in ss.(1). (**Order #68**)
- Disclosure of the mailing list of producers would cause undue financial loss to the institution. There was demonstrable potential for lost advertising revenue for its magazine. Therefore, the harms test was met. (**Order #76**)
- The release of monetary amounts noted beside the name of subcontractors, unit price, alternative price and material variations, all of which are provided in respect of a sealed tender, would prejudice the competitive position of the tenderer if released. However, the harms test is not satisfied in respect of the names of the subcontractors or the details of the bid bond, or security deposit. These items would have to be released. (**Order #166**)
- Release of records revealing steps taken in the development of a product could significantly damage the competitive position of a company where millions of dollars have been invested in research and development of the product. (**Order #P-246**)
- Disclosure of unit price information supplied during a tender would significantly harm competition in this case because competitors could adjust their bids and underbid in future business contracts. The harms test was also made out in respect of a letter of credit. However, the name of the insurance company and the amount of liability coverage was not exempt from disclosure. (**Orders #P-408, M-288**)
- The disclosure of tender information satisfied the harms test in this section where it included the bid breakdown, the unit prices, and alternatives and substitutions proposed with any related prices. (**Orders #P-610, M-250**)
- Where access to a response to an invitation to tender would allow a competitor to determine the profit margin and markup being offered, the bidder's competitive position would be prejudiced in future bids. (**Order #P-431**)
- This part of the test was met where an individual requested access to agreements and other records regarding the suppliers of computer hardware and software for use in a school. The Commission was satisfied that competitive position would be prejudiced if pricing and marketing strategies for computer equipment in the educational market were disclosed. (**Order #M-145**)
- Disclosure of a "trade secret" concerning a proposal for the valuation of child-care centres would harm the competitive position of the third party. (**Order #P-500**)
- In this case, disclosure of preliminary discussions between two First Nations bands and a mining company regarding a proposed mining project would significantly interfere with the ongoing negotiations. (**Order #P-512**)



- The harms test was made out in respect of the disclosure of a private company's proposed locations of sites for medical laboratories and the company's financial position. Since all three parts of the test were made out, the information was held to be exempt. (**Order #P-655**)
- The Commission was satisfied that the disclosure of certain information contained in a Request for Proposal would prejudice the competitive position of Mediascan or interfere with its contractual negotiations. Mediascan had submitted that the information had been developed over a number of years and that the disclosure could allow competitors to upgrade their working procedures, to increase or replicate press coverage and to copy or subvert the various agreements listed in the proposal. (**Order #P-750**)
- The Commission found that an application to an institution for grant funding made by a private sector entity and the evaluation of the application were exempt under this provision. The Commission found that entities that apply for government grants provide detailed information about their funding sources and that disclosure of the information was not necessary to submit the granting agency to public scrutiny. The Commission also found that disclosure would hamper the organization's ability to secure comparable funding. Thus an application provided to the Ministry of Citizenship's "Anti-Racism Operational Funding Program" and its evaluation was not disclosed. (**Orders #P-777, P-800, P-838**)
- In this case disclosure of the reasons for an arbitration decision, the contents of which were supplied by a third party in confidence, could reasonably be expected to interfere with a corporation's negotiations with the Government of Canada and its financial backers for restructuring. (**Order #P-1000**)
- Disclosure of agreements for financing a building by a township would result in the disclosure to its competitors and customers of information about the affected party's business which is not otherwise available to them. This would place the affected party at a competitive disadvantage within its industry and harm its business relationship with its customers. (**Order #M-574**)

ss.(1)(a) and (c)

#### Test Not Met

- The harms test cannot be met where the records that were requested were already publicly available in a court file. (**Order #P-346**)
- Where a company is no longer in existence, no harm can result from disclosure of the records related to it. (**Order #P-367**)



- The harms in these provisions relate to possible future harms that could reasonably be expected to arise if information was released, not harms that could have occurred in the past. **(Order #P-400)**
- The harms in these provisions were not satisfied in respect of information provided to the Ministry of the Environment and Energy in response to the issuance of a control order under the Environmental Protection Act. The Commission did not believe that the information supplied by the company, subject to the Order, would be misused or misinterpreted to the detriment of the company. The records only revealed that the appellant complied with or exceeded the requirements of the Order. In addition, the records, in this case, did not reveal specific processes used by the company that were not already in the public domain. **(Order #P-513)**
- The fact that a document may be privileged in litigation is not sufficient to satisfy the third part of the test. In this case, the third party argued that an agreement may be subject to the litigation privilege if litigation was to ensue and that therefore the harms test was made out. The agreement was made with a view to the settlement of issues that arose in the context of potential litigation. No statement of claim had yet been filed. The Commission ruled that the privileged status of the agreement in another context was not sufficient to engage the harms test in respect of an access to information request. **(Order #P-609)**
- Disclosure of records concerning environmental testing and analysis of a property would not result in commercial harm under this provision despite the affected party's assertion that disclosure would interfere with negotiations related to the land. By not showing the "exact nature of the prejudice to its contractual negotiations," the affected third party failed to establish the harms under this provision. **(Order #P-584)**
- The disclosure of only the dollar amounts of severance payments and gross earnings of distributors, and not the names or numbers of the distributors, was not exempt under these provisions. **(Order #P-705)**
- Where the records are required to be provided by law, this provision can not be applicable. **(Order #P-974)**

#### Test Met

- The disclosure of specific pricing information submitted by a named company to an institution during the tender process was exempt under this provision. **(Order #P-574)**
- Trust companies that provide financial information to the Ministry of Financial Institutions during the regulatory process can reasonably expect that the harms envisaged by these provisions would occur if the records were disclosed. **(Order #P-314)**



- The harms in these provisions were satisfied where corporations provide information for examination to the Ministry of Finance as part of the regulatory process of loan and trust corporations. **(Order #P-480)**
- The harms test in these provisions was met regarding the disclosure of the amount of electricity purchased by Hydro from a named company at a landfill site. Hydro and the third party were able to establish that competitors such as the requester, could formulate an "evaluation" of the reliability of the power plant; the "actual production capability" of the power plant would be known; and the requested information "represented the complete picture of all sales" by the affected party which, together with information on purchase rates already in the public domain, would make it possible to derive a total revenue picture. **(Order #P-531)**
- An affected third party was able to meet the harms test set out in the section by establishing that release of tender documents relating to the development of a computerized registration system for the Ministry of Culture, Tourism and Recreation could result in competitors using the information to develop competing business strategies; or using the information to enhance or design competing computer systems at considerably reduced expense for research and development; or using the information for advantage in future sales activities. **(Order #P-582)**
- This exemption applied and this test was met regarding disclosure of the amount and cost of electricity sold to a named company. The Commission ruled that the disclosure of this information would provide details of the operations of the company, reveal to competitors valuable information about negotiating strategies and provide an unfair advantage to competitors for future contracts. **(Order #P-607)**
- The disclosure of invoices for investigative services provided by a third party was not subject to the harms reflected in these provisions. The invoices contained global figures regarding the amounts billed for fees and disbursements as well as the number of hours of work performed by various employees. **(Order #M-258)**
- Disclosure of the names of customers and information that relates to the materials in which the company deals and its markets were commercial information supplied implicitly in confidence under s.168 of the Environmental Protection Act in circumstances where the disclosure would interfere with the company's contractual negotiations and result in undue loss for the company. **(Order #P-703)**
- Information provided to the Ontario Securities Commission from privately held corporations dealing in investment counselling is exempt under this provision. The Commission was satisfied that the information concerning capitalization, bonding and insurance may impact on the competitive position of the companies. **(Order #P-690)**
- The Commission was satisfied that disclosure of an annual examination report relating to a named credit union would result in the harms envisaged by these provisions. The



examination is conducted under section 138 of the Credit Unions and Caisses Populaires Act and the report consists of a review of the compliance of the business and operations of the credit union. (**Order #P-719**)

- Where a "single source" contract was entered into which contained unique terms and conditions developed by the third party, the contract was not disclosed under this provision. The Commission found that the disclosure would provide competitors with precise information from which they could match or better the terms offered by the third party. As well, the Commission found that the disclosure would interfere with the third party's negotiations with its other customers who would insist on the same favourable terms. (**Order #P-807**)
- Information relating to the price of raw materials which, if disclosed, could enable a competitor to arrange its own pricing in a competitive and ultimately affect the profitability of a company met part three of the test. (**Order #P-877**)

#### Test Partially Met

- Harm was established where disclosure of building plans composed of drawings of the architectural, merchandising, structural, mechanical and electrical configurations of the facilities of proposed tenants in a property development would reveal the merchandising strategy and building operating efficiency of the proposed tenants. However revealing the "number and location of washrooms which can be copied by competitors to gain an advantage in customer service and comfort" did not satisfy the harms test. (**Order #M-520**)

ss.(1)(b)

#### General

- In order to be successful in claiming this part of the exemption, the representations must provide clear and specific evidence linking a reasonable expectation of harm to release of the information. (**Order #P-400**)
- The fact that information would be less likely to be supplied to the institution is not sufficient to comply with this provision. (**Order #P-278**)
- Where legislation requires that the information be provided to a ministry, the ministry cannot establish that disclosure of the information contained in the record would result in similar information no longer being supplied. (**Orders #P-314, P-359, P-400**)
- A letter supplied by a third party to a ministry which contained information beyond that which was required to be reported under the Petroleum Resources Act, was exempt. It was found that the additional information will be more likely to be supplied to the ministry if professionals know that this information will not be disclosed. There was a public



interest in companies continuing to supply this additional information which assisted the ministry in enforcing its regulatory obligations. **(Order #P-841)**

### Test Not Met

- This provision does not apply where the information would continue to be supplied because there would be a financial motivation to sell to the institution and to therefore provide the information. **(Orders #204, P-295)**
- This provision is not satisfied where the information is supplied pursuant to a contractual obligation and there is no evidence that a breach of the contractual obligation is contemplated or reasonably expected. **(Order #P-219)**
- This provision does not apply to a property value appraisal, which must be provided to the ministry to obtain its approval. **(Order #P-356)**
- It is not tenable to argue that the disclosure of a survey will result in surveys not continuing to be supplied, where, under the Surveys Act, surveys are normally registered and made public. **(Order #P-290)**
- This provision is not satisfied in respect of records provided to the institution during the regulatory process under the Loans and Trust Corporations Act. Where a statute has mandatory reporting requirements, the harm envisaged here cannot be met. **(Order #P-314)**
- This provision cannot be used to protect information, which is required to be provided under the Mortgage Brokers Act. **(Orders #P-323, P-528)**
- The Commission was not persuaded that the disclosure of a research document, provided by a privately retained researcher, would result in other researchers not agreeing to do work for the institution. **(Orders #P-454, P-463)**
- This provision is designed to protect the third party and not the institution. Therefore, the Commission did not find that the submission of the institution that credit card expense claims submitted by employees would no longer contain information about the services purchased to be persuasive. The Commission noted that it was in the public interest for this information to be obtained by the institution. The exemption did not apply to this information. **(Order #M-333)**
- Information provided to an institution by a third party to obtain a licence to extract aggregate resources would not cease to be provided if the information was disclosed. Corporations would continue to have a strong incentive to provide detailed information to the institution in order to secure this sort of licence in the future. **(Order #P-798)**



## Test Met

- A letter from an affected party responding to a notice received concerning the possible release of information under the s.17 FIPPA\ s.10 MFIPPA exemption was itself exempt. The letter was implicitly supplied in confidence and disclosure could reasonably result in such information no longer being supplied to the institution. The Commissioner noted that it was in the public interest that affected persons be able to make detailed and frank submissions to institutions. **(Order #P-592)**
- In this case, the Government of Ontario was assisted in its investigation of complaints against certain mortgage brokers by other bodies such as professional organizations which were concurrently examining the same complaints. The supply of factual information, conclusions reached and the outcome of such investigations from organizations outside Government assists the Government of Ontario in meeting its regulatory obligations. The Commission ruled that the harms test was met in that this information would not continue to be disclosed to government if it was disclosed. Curtailing the supply of this information is not in the public interest. **(Order #P-576)**
- Disclosure of records that refer to a pre-application development proposal could result in the information no longer being supplied to the City. The pre-application review procedure is an informal process set up to enable officials to provide helpful information and feedback to individuals who may proceed with a development application. Individuals who avail themselves of this process do so on the expectation of confidentiality. It is in the public interest that such information continue to be supplied because the advice provided during the informal process can lead to the submission of an improved formal application and a streamlined application process. **(Order #M-149)**
- Commercial information about the structure of a sale of condominium units, provided by a third party to the Ontario Securities Commission (OSC), was not disclosed as a result of this provision. While it was possible that the OSC could have obtained the information without the co-operation of the third party, the Commission accepted that it would be cumbersome, expensive and could create consumer non-confidence to do so. The third party stated that if the information was not kept confidential, it would not co-operate with the OSC in the future. **(Order #P-522)**
- A damaging effect on the conduct of future investigations by the Ontario Securities Commission (OSC) was established where it was shown that the OSC relied heavily upon the voluntary co-operation of its sources to obtain the maximum amount of information, and that such future co-operation would be impaired by the disclosure of the record. **(Order #P-583)**
- The Commission was satisfied that this test was met regarding financial information supplied by businesses to obtain government loans. The disclosure of this information could result in businesses not providing frank and detailed information to the government. The Commission ruled that there was a strong public interest in ensuring that detailed and



frank information from prospective loan applicants continue to be supplied to the government. (**Orders #P-604, P-647**)

- This exemption did apply to parts of records pertaining to a forensic accounting investigation into certain allegations. Where the records contained detailed information about the exact nature of the work performed and the strategy to be employed by the accounting firm in the course of the investigation, it was exempt. However, the hourly rates of employees of the firm, where the names have been removed, together with the fixed ceiling costs for the contractual tasks, are not exempt under this provision or under ss.(1)(a). As well, comments and recommendations from the accounting firm to the institution regarding a plan prepared by the institution's staff are also not exempt. (**Order #P-710**)
- The harms associated with this provision were not satisfied in respect of information supplied by companies to Ontario Hydro for approval of changes to rate structures or rate levels. The third parties were unable to establish that they would not continue to provide information that would assist them in obtaining a favourable response. (**Order #P-689**)
- The Commission found that submissions made by third parties, as part of an institution's consultation process in the development of regulations, would continue to be provided even if the third parties knew that the information would be accessible under the Act. It was noted that groups will continue to have a strong incentive to provide their perspectives to institutions with a view toward influencing the future direction of government policy. (**Order #P-771**)

ss.(1)(c)

- The possibility of legal action as a result of a record being released is not sufficient to satisfy the test envisaged in this provision because it is speculative and because harm of this nature cannot be characterized as "undue." (**Order #P-340**)
- The disclosure of a survey commissioned by an individual and provided to a ministry would not result in undue gain to others because surveys are generally registered and made public. This is true even though this survey was not registered and therefore not publicly available. (**Order #P-290**)
- The assertion that a tender submission's unique presentation style would, if disclosed, give a competitor an advantage is too speculative to come within this provision. This was also true of the assertion that the company's approach to the assignment was governed by this provision. This exemption therefore did not apply. (**Orders #P-418, P-419, P-420**)
- In this case, the disclosure of the list of properties that were offered for consideration as potential landfill sites would not result in the harm envisaged by this provision. The Commission was not satisfied that the community where the sites were located or that the value of the particular properties would be negatively impacted by the disclosure of this



information. (**Orders #M-188, M-189**)

- An annual examination report prepared by the Superintendent of Deposit Institutions for the Minister of Financial Institutions of Ontario in respect of a named trust company was exempt under this provision. The trust company was being wound up and the disclosure could affect the likelihood of discounted bids being received on the trust company's assets. In addition, the Commission accepted that the disclosure of the information contained in the record could be employed by knowledgeable persons to the serious detriment of the trust company's receiver and the Canada Deposit Insurance Corporation, at a time when they are trying to generate the maximum return possible through the sale of the assets. (**Order #P-661**)
- Records regarding a specific quarry operated by a named company were exempt under this provision. The information about production data and rehabilitation expenditures were required to be filed with the institution under s.51 of The Aggregate Resources Act for the purpose of calculating the amount of royalties payable by the company to the institution. The Commission was satisfied that the information was explicitly provided in confidence and that disclosure could reasonably be expected to result in an undue loss for the company. (**Order #P-725**)
- In this case there was no evidence provided to the Commission to demonstrate harm from disclosing annual returns required to be filed under the Aggregate Resources Act. The returns show the deposits required to be paid to the Ministry for rehabilitation of the area from which gravel is removed and any refund claimed. (**Order #P-925**)

ss.(1)(d)

- This provision does not apply to records created as a result of an internal workplace harassment investigation. The records were not provided "to" the institution by a third party that is not part of the institution. Even where former employees provide information in this context, the exemption dealing with personal privacy is more applicable than this provision. (**Orders #M-82, P-549**)
- The harm to be expected under this provision is the harm to the mediation process and to harmonious labour relations in general. The phrase "person appointed to resolve a labour relations dispute" is intended to cover information furnished to, and the reports of conciliation officers, mediators and others who are appointed as neutral third parties to resolve labour relations disputes, and only those who are appointed under statutory schemes. (**Order #M-210**)
- This provision was intended to cover the information furnished to, and the reports prepared by conciliation officers, mediators and others who are appointed as neutral third parties to resolve labour relations disputes, and only those appointed under statutory schemes. The Review Officer appointed under s.34(1) of the Pay Equity Act is "another



person appointed to resolve a labour relations dispute" within the meaning of this provision. (Order #P-653)

**s.17(2) [FIPPA] (No comparable MFIPPA section)**

- Subsection 17(2) does not operate retrospectively. (Order #P-263)
- The intent of this section is to exempt the type of tax information that was supplied under the tax statutes administered by the Ministry of Revenue. The assessment of surcharges and penalties under the Workers' Compensation Act is not exempt under this section because it is not gathered for the purpose of determining tax liability or collecting a tax. Compensation funds are not properly characterized as "taxes." (Orders #P-373, P-553)
- The legislative history of this provision is grounded in the Standing Committee of the Legislative Assembly's comprehensive review of confidentiality clauses in Ontario statutes. The Committee noted that the confidentiality clauses in the 11 tax statutes could be the subject of an exemption in the legislation as opposed to overrides in s.67. The intention of the provision was to provide for the secrecy of information submitted on tax returns and other information relating to the tax liability of taxpayers. Since individual taxpayers have protection under s.21(3)(e), this provision was put in place to protect the secrecy of taxpayers other than individuals, such as corporate taxpayers. The Commission ruled that in this case this provision applied to letters of credit provided to the Ministry of Revenue under the Tobacco Tax Act as security for the payment of taxes. Each of the letters of credit contained information regarding the identity of the company providing the letter of credit, the amount of the security, the name and address of the financial institution that holds the letter of credit and the expiry date of the security. (Order #P-553)
- It was not the intention of this provision to prohibit disclosure of information where another Act states that the information must be made public. (Order #P-931)
- The Divisional Court suggests that Workers' Compensation Assessments may be akin to a tax, but did not decide the issue. However, the court declined to overturn the Commissioner's decision that there was no exemption. (**Re Workers' Compensation Board and Mitchinson, Assistant Information and Privacy Commissioner, (1995), 23 O.R. (3d) 31 (Div. Ct.)**)

**s.17(3) [FIPPA] s.10(2) [MFIPPA]**

- Where an "Application for Anti-Racism Operational Funding Program" contained this provision as a condition, though in small print, the Commission found that the 'in confidence' test continued to be met in respect of certain parts of the application. This provision uses the term "may" and it was determined that the institution had not taken sufficient steps to bring the significance of the provision to the attention of the organization applying for funding. (Order #P-777)



A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that

belongs to the Government  
of Ontario or an  
institution

belongs to an institution

and has monetary value or potential monetary value;

- (b) information obtained through research by an employee of an institution where (FIPPA)/if (MFIPPA) the disclosure could reasonably be expected to deprive the employee of priority of publication;

- (c) information where the disclosure (FIPPA)/whose disclosure (MFIPPA) could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario (FIPPA)/an institution (MFIPPA);

- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

- (g) information including the proposed plans, policies or projects of an institution where (FIPPA)/if (MFIPPA) the disclosure could reasonably be expected to result in



premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

- (h) questions that are to be used in an examination or test for an educational purpose;
- (i) submissions under the Municipal Boundary Negotiations Act by a party municipality or other body before the matter to which the submissions relate is resolved under that Act.

**EXCEPTION**

**No comparable section**

(2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

- (a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or
- (b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.



## General

- In all cases where a claim for exemption is made under this section, an onus rests with the institution to demonstrate that the harms envisioned are present or reasonably foreseeable. In the absence of evidence to support the claim, the information should be disclosed. (**Orders #48, 141, 162, 163, P-472, P-520, P-529, P-532, P-581**)
- There is a public interest in obtaining information about Ontario government joint business ventures with private sector companies. In a postscript of this decision, the Commissioner stated that where private sector organizations enter into arrangements with government, they must expect public scrutiny. He suggested that at the time a new arrangement is formed, a public document be prepared by the appropriate institution outlining the nature of the arrangement. The document could identify those who are involved in the arrangement and the nature of their involvement and other information, which are not otherwise exempt under the Act. (**Order #P-532**)

## ss.(1)(a)

- This provision requires that the information itself has an intrinsic value. For example, it could be said to have monetary value if it is going to be published and sold. In **Order #P-487** the Commission ruled that minutes of the Board of Directors of SkyDome do not contain information that has monetary value. (**Orders #P-219, P-248, P-270, P-288, P-290, P-346, P-487, P-581, M-326, P-729, P-797**)
- "Monetary value" means the information has an intrinsic value. The fact that information could be sold to third parties for their use in subsequent negotiations with the institution, or that such information could be sold to the media because of their interest in the subject matter does not mean that the information has an intrinsic value. (**Order #P-581**)
- A plan of survey that was paid for by individuals and sent to an institution is not subject to this provision. While it has monetary value, it does not have value for the institution. As well, the institution has not shown that it intends to sell or use the records for gain. (**Order #P-290**)
- Records are not exempt under ss.(1)(a) where they contain information concerning the status of litigation that can be discerned easily from publicly available court records. (**Order #141**)
- Technical information is information belonging to an organized field of knowledge, which would fall under the general categories of applied sciences or mechanical arts. The questions and ideal answers used in job competitions would not be included in the meaning of the term. (**Orders #P-454, P-662**)



- The City could not establish that the list of names and addresses of various businesses and other non-residential entities which received services from the Works Department of the City was exempt under this provision. While the City asserted that the list was valuable to private waste removal companies, the Commission found that there was insufficient evidence to support the assertion. Indeed, on termination of the waste collection service, the City provided the recipients listed in the record with an information package and a list of approved waste removal contractors, to assist them in the selection of a waste removal contractor. (**Order #M-326**)
- Portions of the Ontario Northland Transportation Commission's President's Reports were not exempt under this provision. The institution had no intention of publishing or disseminating this information in a way that would result in some form of monetary payment and, as a result, the Commission was not satisfied that this exemption applied. (**Order #P-627**)
- Subsection (1)(a) exempts classes or types of records based on content. A technical assessment of the unique design of a structure such as the SkyDome falls within the exemption. (**Orders #163, 203**)
- Scientific information contained in a research project that was developed by an institution was shown to have potential monetary value. Subsection (1)(a) applied. (**Order #P-270**)
- A list of addresses kept by the Ontario Lottery Corporation was exempt under this provision. "Commercial" information is information that relates solely to the buying, selling or exchange of merchandise or services. The addresses of Sports Select Lottery outlets qualify as commercial information. These addresses were the property of the Ontario Lottery Corporation in that it created the list as a result of its contractual relations with its retailers and it is the only source of the list. The Commission accepted that the list is a saleable asset with potential monetary value. The institution provided corroborating evidence from a supplier of mailing lists to support its position that the list had a market value that exceeded several thousand dollars. (**Orders #P-636, P-662, P-493**)
- Invoices noting the quantity and category of liquor products purchased by a consulate were exempt under this provision. The Liquor Control Board of Ontario (LCBO) established that this information was commercial or financial, that it belongs to both the LCBO and the consulate and that it has monetary value. The Commission held that the fact that both the LCBO and the consulate had joint proprietary interest in the information did not vitiate the application of this exemption. Regarding monetary value, the LCBO established that there is a market for sale of data information and that it will be selling that data shortly. (**Order #P-797**)

**ss.(1)(a) and (c)**

- Subsections (a) and (c) may not be applied when the information is in the public domain through a bona fide publication by the media. (**Orders #87, P-270**)



**ss.(1) (b), (c), (d) and (g)--"Reasonable Expectation"**

- The Commission confirmed that "reasonable expectation of harm" required that the institution establish a clear and direct linkage between the disclosure of the information and the harm alleged. The Commission approved of the position taken by the Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture) [1989] 1 F.C. 47 at 59-60, where the Court indicated that a "reasonable expectation of probable harm" was required. It also approved of the Federal Court Trial Division's decision in The Information Commissioner of Canada v. The Prime Minister of Canada, unreported, November 19, 1992, where the Court stated that the mere "possibility" of harm was not sufficient. The Court held that descriptions of possible harm, even in substantial detail, are insufficient in themselves. Justice Rothstein stated that:

The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantial the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a Court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged...While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality, would...be more difficult to satisfy.

**(Orders #P-534, M-202, P-555, P-557, P-590, M-221, M-242, P-627, M-333, P-705)**

**ss.(1)(b)**

- Where an employee prepared a research paper and where she provided an affidavit to the Commission indicating that, following internal peer review, she intended to publish the paper in an appropriate scientific forum, the Commission was satisfied that this exemption applied. The Commission found that premature release of the record could reasonably be expected to deprive her of priority of publication. **(Order #P-811)**

**ss.(1)(c)**

- The standard of proof regarding this exemption is as stringent as s.17 [FIPPA] \ s.10 [MFIPPA]. Here the institution did not provide evidence to suggest that a drop in competitive position would result if the information was released. The expectation of harm to an institution's economic interests or competitive position must not be fanciful, imaginary or contrived, but based on reason. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between



the disclosure of the information and the harm that is alleged. In addition, the evidence to support the expectation must be detailed and convincing. (**Orders #141, 162, 163, 204, P-218, P-248, P-263, P-346, P-398, M-27, M-37, M-67, M-202, M-130, P-463, P-487, M-209, P-581, M-210, M-221, M-273, P-641, P-705, M-326, P-767, P-768, P-769**)

- Although private sector parties may demand complete confidence in their business dealings with Crown agencies, the institution's economic interests are not necessarily prejudiced by disclosure. (**Order #55**)
- It is not tenable to argue that the disclosure of a collection of research materials, with some annotations appended by the person who collected them, could compromise the land claims negotiation process with aboriginal people; possible consequences of disclosure are not sufficient to satisfy this exemption. The institution putting forth this claim must demonstrate a clear, specific and understandable linkage between its allegations of harm and disclosure of the records at issue. (**Orders #P-454, P-463**)
- The disclosure of anonymized school test results, which may reflect negatively on the school, cannot reasonably be expected to prejudice the economic interests of the school or its competitive position. (**Orders #M-27, M-37**)
- In this case, a breakdown of the total annual operating costs of a part of an institution was so general in nature, that the disclosure of the record was authorized. (**Order #M-92**)
- The fact that disclosure of pay equity evaluation sheets may result in disclosure to the union and may be misused to convince an arbitrator to increase rates of pay for employees is not sufficient to apply this provision. (**Order #M-117**)
- This provision does not contemplate prejudice to any and all economic interests of an institution in its relations with its employees; rather, it deals with records that if disclosed could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy or adversely affect the government's ability to protect its legitimate economic interests. As a result, this exemption cannot apply to records created during the grievance process. (**Order #P-441**)
- This provision did not apply to tender documents disclosing the prices paid by successful bidders for surplus inventory sold by Ontario Hydro. The Commission ruled that the disclosure of the selling prices would not undermine the sealed bid process or prejudice the economic interests of the institution. (**Order #P-520**)
- Disclosure of parts of the City contract with the Quebec Nordiques regarding the American Hockey League team coming to Cornwall was exempt under this provision. Disclosure of the financial terms of the agreement could reasonably be expected to prejudice the City's competitive position and / or its economic interests. (**Order #M-242**)



- This exemption was satisfied where minutes of meetings disclosed Carload Freight information which would detrimentally affect the Ontario Northland Transportation Commission by providing competitors, especially highway carriers, with market data and other critical information. (**Order #P-627**)
- The Ontario Lottery Corporation was unable to provide sufficient evidence to the Commission to establish the relationship between disclosure of severance payments paid to distributors and the types of contracts it is in the process of negotiating. Similarly, the institution could not establish that the disclosure of the distributors' past gross earnings would be exempt under this provision. (**Order #P-705**)
- A letter sent to the union during a previous job action is not exempt under this section based on the institution's assertion that disclosure would permit the use of this information in respect of future job actions. The fact that the letter was sent to the union negates this claim. An internal management document that clarifies the terms of the agreement, which ended the labour dispute, is also not exempt. The institution's generalized assertion of harm is not sufficient. (**Order #P-398**)
- Information such as the monetary terms of a proposed sale of SkyDome, the financing details, the structuring of the purchasing groups and related details of a possible sale of SkyDome contained in a letter of intent negotiated between SkyDome and potential purchasers was exempt. A list of outstanding court cases involving SkyDome attached to the letter was not exempt, since the information was publicly available. (**Order #P-581**)
- The release of a list of books provided by teachers to college bookstores could reasonably be expected to prejudice the institution's economic interest and competitive position. (**Orders #109, 110**)
- The disclosure of a prose description of financial data is the same as disclosure of actual financial forecasts; both would satisfy the test in ss.(1)(c). (**Order #P-248**)
- A mailing list of an institution's corporate clients has an intrinsic value to the institution. In this case the information is essential to the institution's marketing and promoting of its services and is used to generate income. As well, once the list is released, it could be sold or given to other companies or individuals that are in competition with the institution. As a result, it is exempt under this provision. (**Order #M-67**)
- Disclosure of the inducements given by a landlord to an institutional tenant for certain leasehold premises did not contravene this provision. The Commission considered that lessors generally regard the provincial government as a desirable tenant and that the commercial real estate market in the province is in a depressed state with high vacancy rates. Consequently the Commission found that even if the inducements were made public, the lessors would continue to have a strong incentive to rent commercial premises to the provincial government. While the Commission acknowledged that the institution would not operate on a level field with other lessors if disclosure was ordered, it ruled that



leases for government premises are obtained with public funds such that the information ought to be available under Act. (**Order #P-829**)

- The Ontario Lottery Corporation successfully demonstrated a reasonable expectation of prejudice to its economic interests when it explained that one of its business activities is that of developing and marketing new lottery games for sale to the public. First, the market research it commissions allows it to develop unique sales and marketing strategies for its various lottery products. Secondly, the market in which it offers its various lottery games is becoming increasingly competitive and the studies commissioned by OLC would be of substantial value to persons or entities operating gaming activities or consulting services to the same. (**Order #P-941**)
- A survey that portrays an unflattering picture of a ministry aviation program was not exempt under this provision. (**Order #P-964**)

**ss.(1)(c) and (d)**

- The Divisional Court overturned the decision of the Commission in **Order #P-590** which held that the Ministry of Health had not provided sufficient information to establish that the disclosure of version codes on health cards would not be exempt under these provisions. The Court ordered the Commission to reconsider this exemption because it held that it was clear on the evidence that "health card fraud is occurring and that the version code system responds to that problem." [at 3] Moreover, the Court stated that the particulars of the request and the requester was relevant to the consideration. (**The Queen in Right of Ontario as represented by the Ministry of Health v. Anita Fineberg et al., June 24, 1994, Ont. Div. Ct.**)
- The term "could reasonably be expected to" means that the expectation must not be fanciful, imaginary or contrived, but rather based on reason. Detailed and convincing evidence is required to support a claim under these provisions. (**Orders #203, P-218, P-229, P-248, P-263, P-288, P-339, P-398, M-27, M-117, P-441, P-444, M-130, P-557, M-202, M-273**)
- These provisions do not apply to question-and-answer sheets completed during a job competition. (**Order #P-339**)
- The Commission was not satisfied that the disclosure of questions and answers and documentation used for the purpose of conducting interviews for internally held job competitions could reasonably be expected to prejudice the economic interests of an institution or its competitive position. The institution submitted that potential unqualified candidates would be able to learn the correct answers and thus make it impossible for the institution to hire the appropriate person. It also submitted that the questions were developed to ensure that the successful candidate was qualified for a technical position. These facts, however, were held to not support the application of this exemption. (**Order #M-377**)



- The exemption did not apply to records containing statistics on accidents/fatalities that occurred at SkyDome. The fact that the institution may be exposed to civil litigation as a result of the disclosure was not relevant. (**Order #P-605**)
- The fact that an agreement contains a confidentiality clause is not sufficient to satisfy this exemption. In addition, the belief that the institution may be sued if the information is released is not sufficient to satisfy this exemption. (**Order #M-273**)
- While the disclosure of the details of the terms and conditions of financial assistance provided to loan applicants by the Ontario Film Development Corporation (OFDC) may result in economic harms in relation to the OFDC's ability to fund future film projects, disclosure of the dollar amounts of the loans, and nothing more, were held to not be exempt under this provision. (**Order #P-729**)
- The fact that the requester is employed by a party who may be opposite in interest to the institution from which the information is sought is not conclusive in establishing a claim for exemption under ss.(1)(c) or (d). (**Order #P-229**)
- The names of individuals noted on expense claims submitted for payment by an employee to an institution were not exempt under these provisions. The Commission did not find that the disclosure of the names of business contacts might result in prospective clients no longer wanting to explore commercial ventures with the institution. (**Order #M-412**)

**ss.(1)(d)**

- The onus rests on the institution or third party to demonstrate that harms envisioned by the section are present or reasonably foreseeable. (**Orders #48, 55, 70, 141, P-229, P-293, P-346, P-454**)
- In this case, the disclosure of a list of properties that were offered as potential landfill sites would not be exempt under this section. The municipality had provided journalistic evidence that persons living in the vicinity of proposed landfill sites expressed strong opposition to such proposals. The Commission noted that the municipality had not provided detailed and convincing evidence that the types of harm described was a "reasonable expectation." The Commission held that there was no necessary connection between the disclosure of the information and the harm envisaged by this section. (**Orders #M-188, M-189**)
- The institution must provide evidence to substantiate the submission that release would restrict the ability of the institution to attract bidders in the future. (**Order #101**)
- Mere assertion that actions injurious to SkyDome are injurious to the Government of Ontario since the government is the sole shareholder were insufficient to apply the exemption. (**Order #P-581**)



- An institution's belief that it might be sued if the records are released is not sufficient grounds to invoke this exemption. (**Order #41**)
- In this case, briefing materials concerning the expansion of GO Transit rail service were not exempt under this provision. (**Order #P-529**)
- In this case access to certain information about the agreements the Ontario government entered into with Teranet to produce a land-related information system was properly denied under this provision. The Commission accepted that disclosure of the terms beneficial to Ontario would impair Teranet's negotiating position with other jurisdictions. The Ontario government is a principle shareholder in Teranet. (**Order #P-532**)
- A report entitled "Draft Advice to the Deputy Minister on Fraud and EFT Control Options in the Family Benefits Act Program" outlined internal control weaknesses within the social assistance system. The Commission found that the disclosure of the report would lead to abuses in the system and increase the incidence of social assistance fraud, resulting in financial loss for the province. Thus the exemption applied. (**Order #P-752**)
- In this case cellular telephone calls are billed to the recipient of the call. In response to a request for the cellular phone numbers used by the police, the police argued that it was reasonably foreseeable that through use or dissemination of these cellular telephone numbers, these telephones would be exposed to unauthorized use, with resultant costs to be borne by the Police. The Commission found that disclosure of the cellular telephone numbers would significantly compromise the ability of the Police to control associated expenditures. Accordingly, the Commission ruled that disclosure of these numbers could reasonably be expected to be injurious to their financial interests. (**Order #M-551**)

**ss.(1)(e)**

- This exemption cannot be relied upon where the records have been applied to the negotiations. It contemplates ongoing or future events. The provision is not wide enough to encompass negotiations that have not commenced or that are not contemplated. In order to apply this exemption the institution must establish that 1. the record contains positions, plans, procedures, criteria or instructions; 2. the record is intended to be applied to negotiations; 3. the negotiations are being carried on currently or will be carried on in the future; and 4. the negotiations are being conducted by or on behalf of an institution or the Government of Ontario. (**Orders #87, 141, 154, 163, 204, P-218, P-219, P-278, P-288, P-293, P-346, P-398, M-90, M-92, M-117, P-454, M-130, P-477, P-487, P-581, M-310, M-394**)
- Records revealing the negotiating positions of municipalities, even though in the possession of the ministry, are not covered by the exemption in ss.(1)(e) because municipalities are not "institutions" as defined by the Freedom of Information and Protection of Privacy Act. (**Order #69**)



- Contractual terms and conditions contained in a letter of intent which has been finalized cannot be said to relate to positions, plans or criteria to be applied to future negotiations. **(Order #P-581)**
- A record that identifies the position an institution intends to take with respect to the rights of a union is exempt under this section. The institution provided sufficient evidence that negotiations will be carried on in the future. **(Order #M-92)**
- Records regarding ongoing negotiations between the government and OPSEU on the subject of reform of legislation may be exempt under this provision. **(Order #P-468)**
- Handwritten notes on a draft agreement involving an institution and four First Nations were held to be exempt under this provision. The notes set out the position of the ministry respecting the various terms of the agreement. The position in the notes were to be applied to negotiations that were underway or contemplated in the future. **(Order #P-772)**
- This exemption applied to two versions of a discussion paper created to support specific negotiations being undertaken between the government of Ontario and a particular First Nation. While the negotiations have produced an Agreement in Principle between the parties, the First Nation had not formally ratified the document. The Commission found that further negotiations may be necessary if the Agreement is re-opened. **(Order #P-809)**

**ss.(1)(f)**

- This exemption contemplates ongoing or future events. **(Order #141)**
- A "plan" is defined as "a formulated and especially detailed method by which a thing is to be done; a design or scheme." A plan to change current practice or to continue current practice is a "plan" within ss.(1)(f). The "plan" must not yet have been put into operation or made public. **(Orders #P-229, P-248, M-77, M-90, M-92, P-426, M-117, P-555, P-592, P-581, P-603, P-658, P-767, P-768, P-769)**
- A consultant's report of the staffing systems in use in a township is not a "plan." The report includes a description of the methodology of study employed by the consultant, the historical background of the issues involved, and the consultant's observations and recommendations for change. The record does not contain the sort of detailed methods, schemes or designs that are characteristic of a plan; on the contrary, it provides advice for developing a plan or plans to resolve the issues. **(Order #M-77)**
- A review and analysis of a transit contract in effect in a Town does not contain the sort of detailed methods, schemes or designs that are characteristic of a plan. The record simply provides advice for developing a plan to resolve issues. It is therefore not covered by this provision. Similarly, a consultant's report regarding recommendations for improved fire



services did not contain a "plan" as envisaged by this exemption. (**Orders #M-90, M-92, P-603**)

- This provision is designed to protect "plans" that have not yet been put into operation or "plans" that have not yet been made public, irrespective of the consequences of its disclosure. A "plan" that has already been put into operation cannot qualify for exemption under this provision unless it is shown that it will be made public in the future. (**Orders #P-426, P-784**)
- Records related to a nuclear generating plant were not subject to this exemption. The record did not contain a formal conclusion about adopting any particular proposal regarding the generating plant's future. In this case, none of the suggested scenarios were selected and a further review was commenced. The purpose of the analysis here was to determine the most cost-effective option for the future of the plant. As a result, the substance of the information did not relate to the management of personnel or the administration of the institution. (**Order #P-555**)
- A record that does not circumscribe a detailed method for accomplishing a particular objective or thing cannot be said to be a "plan" under this provision. A "plan" is a formulated and especially detailed method by which a thing is to be done. (**Orders #P-581, P-784**)
- An audit report that contained findings, conclusions and recommendations did not contain a "plan" as envisaged by this subsection. The audit report was not intended to be an especially detailed method for carrying out the recommendations, rather, they would form the basis for the development of a plan which would then set out the detailed methods and actions required to accomplish the recommendations. (**Order #P-603**)
- The Commission held that this provision did not apply to prevent the disclosure of questions posed during a job competition. This provision protects "plans" that have not yet been put into operation or "plans" that have not yet been made public. The section is concerned with the nature and status of the record, rather than the consequences of its disclosure. Therefore, the Commission found that a "plan" that has already been put into operation cannot qualify for exemption under this provision, unless it is shown that it has not yet been made public. (**Orders #P-767, P-768, P-769**)
- Records in a grievance file, including handwritten notes, memoranda exchanged between institution officials and a report of a second-stage grievance meeting were held to not be covered by this exemption. The Commission did not accept that the grievance material was being used to develop a strategy to defend its position in an upcoming grievance hearing where the issue was the same. It found that the records simply outlined the institution's approach for dealing with one particular grievance. (**Order #P-784**)



- A consultant's report concerning a school contained certain recommendations which, if adopted and implemented might involve the formulation of a detailed plan, but the record itself was not a "plan." (**Order #P-348**)
- A report of a review of a legal branch of an institution is not a plan in its entirety simply because it outlines management problems that require attention and how these may be addressed. The record did not contain the sort of detailed methods, schemes or designs that are characteristic of a plan. The recommendations, if adopted and implemented, may involve the formulation of a detailed plan. (**Order #P-658**)
- To qualify under this exemption, a record must meet the following test: 1. the records must contain a plan or plans, and 2. the plan or plans must relate to either the management of personnel or the administration of an institution, and 3. the plan or plans must not yet have been put into operation or made public. (**Order #M-480**)
- A report on the management and day to day operation of the Ministry's Queen's Park Services including the current status of the program's personnel, its financial obligations and recommendations for improving the services does not contain detailed methods, schemes or designs which are characteristic of a plan. It is evident that the Staff Sergeant did not intend it to be used as a plan, but rather, as a document which provides advice for the development of a plan to resolve the issues which it identifies. Therefore, this exemption did not apply. (**Order #P-989**)

**ss.(1)(f) and (g)**

- A record containing recommendations which, if adopted and implemented, might involve the formulation of a plan is not exempt under these provisions. (**Order #P-348**)

**ss.(1)(g)**

- In order to qualify for the exemption in this section, the institution must establish that a record: 1. contains information including proposed plans, policies or projects; and 2. that disclosure of the information could reasonably be expected to result in: i) premature disclosure of a pending policy decision, or undue financial benefit or loss to a person. Where a record discloses the issue about which the institution will, in the future, make a decision, the exemption does not apply. (**Orders #P-229, P-320, M-90, P-346, P-426, M-117, P-487, M-182, M-188, M-189, M-209, P-555, P-772, P-790, P-811**)
- "Detailed and convincing" evidence must be provided to establish that disclosure of the record could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person. (**Orders #163, P-270**)



- The possibility that something could occur is not sufficient under this section. Therefore, where minutes of the Board of Directors at SkyDome concerned a long-term financing proposal and the institution submitted that it may re-examine the matter in the future, the possibility was not a "plan." (**Order #P-487**)
- The term "pending policy decision" contemplates a situation where a decision has been reached, but has not as yet been announced, rather than a where an institution is considering a policy decision. (**Orders #M-182, P-555, P-726**)
- The intent of this provision is to allow an institution to avoid the premature release of a policy decision and therefore there must necessarily exist a policy decision that the institution has already made. In the absence of such a determination, the assessment of harm would be an entirely speculative exercise. The Commission ruled that this provision did not apply where the policy process had not been completed. (**Order #P-726**)
- Records in respect of a long-term financing proposal are not exempt under this provision simply because, in future, the institution may wish to re-examine the proposal. The reasonable expectation contemplated by this provision cannot be satisfied by speculation. (**Order #P-288**)
- This exemption cannot be relied upon where the harm would not result from the disclosure of the records, but rather from the potential misuse of the records on disclosure. (**Orders #154, M-117**)
- This exemption cannot be relied upon where the records sought are available to the public from the court office where the action is filed. (**Order #162**)
- The disclosure of part of a draft report containing technical analyses of a number of potential landfill sites would not disclose a proposed plan or policy. The institution had not indicated that there were pending policy decisions relevant to this matter. (**Orders #M-188, M-189**)
- In this case this exemption did not apply to records dealing with a nuclear generating plant. The records described the impact of certain variables on various fact situations, but did not contain any recommendation regarding a policy decision that Hydro intended to implement. The fact that disclosure of a record may lead to speculation and may cause economic harm to the local economy is not sufficient to satisfy this provision. (**Order #P-555**)
- Access to the "correct answers" used during job competitions are not exempt under this provision. The "correct answers" are not part of "proposed plans or policies." (**Order #P-426, P-767, P-768, P-769**)
- This exemption may not be used to exempt from disclosure of job competition questions. The Commission ruled that the list of interview questions cannot reasonably be



characterized as a detailed method, scheme or design and, hence, a plan for the purposes of this section. Even if the questions were a plan, they had already been used in the interview and therefore would not constitute a proposed plan. (**Order #P-693**)

- Draft agreements reflecting the Ontario government's negotiation strategy with four First Nations regarding fishing rights, harvest quotas, conservation and resource co-management constitutes a "planned undertaking" and therefore a project under this provision. The Commission found that the negotiations are highly sensitive, that premature disclosure of draft agreements in this regard could result in the First Nations abandoning the negotiations and that this would result in financial loss. (**Order #P-772**)
- The intent of this section is to allow an institution to avoid the premature release of a policy decision where that disclosure could reasonably be expected to harm the economic interests of the institution. In order for this section to apply, there must necessarily exist a policy decision which the institution has already made. In the absence of such a determination, the assessment of harm would be entirely speculative. In addition, the first part of this provision makes specific reference to proposed policy decisions. The Commission held that the nature of the wording contemplates that the type of decision referred to in the second part of the test will be one that has already been made. (**Order #P-790**)

ss.(1)(h)

- This exemption does not apply to the particular questions **that were used** by a community college in an examination taken by the appellant. The fact that the questions **may** be reused in future examinations does not alter this conclusion. In the result, the examination questions together with the appellant's answers were disclosed. (**Orders #P-351, P-422, M-266**)
- In this case, the Commission was not satisfied that the questions will be used for examinations in the future. The tests had not been finalized and the school board stated that the questions will be incorporated into examinations to be given. The Commission ruled that in the absence of more definitive evidence, it could not be determined that the questions will actually be incorporated into the examinations in the future. (**Order #M-266**)
- A booklet of final exam questions used by a community college is not exempt under this provision. This is so even though the questions are contained in a booklet that is separate from the answers that the student provides. In this case, the student was given an opportunity to review the questions after the exam and take notes of what the questions were. It was therefore not possible for the college to argue that disclosure of the questions would impair the integrity of the "test bank." (**Order #P-422**)
- This exemption cannot be used to justify non-disclosure of the suggested answers or a student's answers and scores, and the examiner's comments. (**Orders #M-91, P-461**)







FIPPA

MFIPPA

s.19

SOLICITOR-CLIENT PRIVILEGE

s.12

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel (FIPPA)/counsel employed or retained by an institution (MFIPPA) for use in giving legal advice or in contemplation of or for use in litigation.







## General

- This exemption covers records subject to the common-law solicitor-client privilege (Branch 1) or those records prepared by or for Crown counsel or counsel employed or retained by an institution, for use in giving legal advice or in contemplation of or for use in litigation (Branch 2). The common-law privilege applies to:
  1. all communications, verbal or written, of a confidential character, between a client, or his or her agent, and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto); and
  2. papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated.

The latter branch can apply regardless of whether the common-law privilege applies. (Orders #39, 49, 52, 56, 57, 68, 116, 126, 135, 136, 137, 141, 143, 150, 158, 160, 163, 170, 191, 192, 200, 210, P-218, P-233, P-235, P-278, P-284, P-291, P-301, P-304, P-310, P-326, P-329, P-365, P-377, P-398, P-399, P-402, P-403, P-407, M-2, M-10, M-11, M-19, M-52, M-59, M-61, M-83, M-86, P-417, P-424, P-428, P-441, P-442, M-120, M-121, P-449, P-454, P-467, P-483, P-475, P-477, M-157, M-158, P-492, M-162, P-501, P-506, P-504, P-506, P-529, M-173, P-546, P-550, P-551, P-538, P-604, P-586, P-580, P-577, P-579, M-237, P-585, M-233, P-583, P-592, P-613, M-257, M-258, M-260, P-624, P-635, M-274, M-280, M-281, M-285, M-286, P-666, P-667, M-310, M-291, P-660, M-315, P-676, P-677, P-699, P-701, P-702, M-328, M-327, P-710, M-353, M-392, P-771, M-394, P-776, P-780, M-427, M-431, P-790, P-792, P-803, P-823, P-820, P-827, M-441, M-502, P-930, M-534, M-540, M-559, M-521, P-902, M-516, P-944, P-952, P-968, P-979, P-980, P-988)



- A record that is prepared for Crown Counsel for use in giving legal advice is exempt under this section, if that is its dominant purpose and even if it also has another purpose. A letter from Crown Counsel requesting an accounting firm to perform an investigation of a former Treasurer's activities is a record prepared to assist in giving legal advice. The investigation report is also privileged because the dominant purpose in the preparation of the document is for use in the giving of legal advice, even though it was also prepared for operational purposes. Since the requesting letter is exempt, it is unreasonable not to also exempt the investigation report. Further consistency requires that an internal memo as to the conduct of the investigation should also be exempt. The Ontario Divisional Court found that the Inquiry Officer had interpreted branch #2 of the solicitor-client privilege exemption too narrowly in finding that records had to represent communications of a confidential nature between a client and a legal advisor which are directly related to seeking, formulating or giving legal advice. **(The Attorney General of Ontario and Donald Hale, Ernst and Young and John Doe, April 11, 1995, Ontario Divisional Court, Court File No. 462/94, Justices Saunders, Rosenberg and Feldman)**.
- The Commission had previously held as follows: the second branch of this exemption requires that the record be prepared for use in giving legal advice or in contemplation of litigation. This is a narrower wording than if the statute used the phrase "for the purpose" of giving legal advice. Therefore, to rely on this exemption the record itself must be used in giving legal advice. Moreover, "legal advice" generally includes a legal opinion about a legal issue and a recommended course of action based on legal considerations. It does not include information given about a matter with legal implications where there is no recommended course of action based on legal considerations and where no legal opinion is expressed. **(Orders #210, P-236, P-281, P-368, M-59, P-454, M-173, P-604, P-585, M-233, M-237, P-592, P-583, M-258, M-286, P-666)** This point has been overturned by Judicial Review. The Judicial Review, **The Attorney General of Ontario and Donald Hale, Ernst and Young and John Doe, April 11, 1995, Ontario Divisional Court, Court File No. 462/94, Justices Saunders, Rosenberg and Feldman** is annotated above and in the Judicial Review section.
- For section 19 to be applicable, the institution must be engaged within a solicitor-client relationship. The exemption does not apply to records that were generated either before counsel was hired or after counsel's retainer was terminated. **(Order #M-485)**
- The Commission rejected an argument made by an institution that the actual content of correspondence between a solicitor and client should bear little relevance to the determination of whether the records should be disclosed because the very possibility of disclosure would constrain the quality, candour and reliability of advice provided by Counsel. In the Commissioner's view, such a broad approach to the exemption would be inconsistent with the purposes of the Act. **(Order #M-520)**

#### Privilege Applies

- A briefing note that summarizes the substance of an opinion given by an institution's legal counsel to an institution employee is privileged. **(Order #135)**



- A Crown counsel's memorandum is prepared for use in giving legal advice where it provides an interpretation of an agreement and legal options to consider in attempting to resolve a matter under dispute. **(Order #P-281)**
- Letters from the prosecuting Crown attorney to the investigating officer or to the Sheriff's officer regarding a particular prosecution are exempt under this provision. **(Order #P-381)**
- It is possible for letters or communications passing between opposing counsel to obtain the status of a privileged communication if they are made "without prejudice" and in pursuance of settlement. **(Order #49)** See contra below.
- The privilege did not apply to "Minutes of Settlement" entered into between a Board and its former employee. The Commission found that at the time the settlement was negotiated the Board could not have expected that litigation would occur regarding the terms of the agreement. It was noted that given that the agreement was endorsed by all the parties litigation would be most unlikely. **(Order #M-441)** See contra above
- Where a non-lawyer employee of an institution creates a record that quotes from a legal opinion provided by a lawyer to the institution, the quotes are exempt under this section. **(Order #P-417)**
- A "request for legal opinion" together with the resultant legal memorandum was held to be exempt under this provision. **(Order P-823)**
- Invoices from a forensic accounting firm which details the activities of the investigatory team were exempt. **(Order #M-521)**
- Correspondence between a municipality and its solicitor which included draft documents prepared by a solicitor for review by the client and which included legal advice from a solicitor to a municipality regarding the development plans for a property fell under Branch 1 of the exemption. Equally, facsimile transmissions from a municipality to its counsel asking for legal advice are privileged. **(Order #M-520)**
- Records prepared by a manager in an institution relating to a complaint made by the requester to the Ont. Human Rights Commission for use by the institution's counsel to assist in the preparation of a defence to the complaint are exempt under Branch 1 of the privilege. **(Order #M-523)**
- The common law privilege applied in documents which were correspondence between a ministry solicitor and a senior crown counsel at the Ministry of the Attorney General concerning legal issues. These records contained instructions provided by the ministry solicitor to counsel with respect to the preparation of a legal opinion, information related to the creation of an opinion, the opinion itself and the clarification of the opinion. **(Order #P-979)**



- When a Native land claim is filed, it is directed to the Negotiations Support Branch of the Ontario Native Affairs Secretariat for historical research. Once this research is completed, the research report and the claim are forwarded to the Legal Services Branch for a legal opinion. The report is the primary source of the legal opinion. Ontario's position on the land claim is then developed on the basis of historical data and the legal opinion. The research report and the status report are prepared for Crown counsel for use in giving legal advice. A status report is also prepared by Crown counsel for use in giving legal advice on the same land claim. The Commission is satisfied that legal advice regarding land claims must necessarily have a basis in historical research and evidence. Therefore, the requirements for exemption under Branch 2 have been met and section 19 applies. (**Order #P-949**)

#### A. Legal Accounts

- A legal account from a lawyer to his or her client reflects a confidential communication related to legal advice and is therefore exempt under the first branch of the common-law solicitor-client privilege. The account reflects communications of a confidential nature directly related to the seeking, formulating or giving of legal advice between a client and its legal advisor. The Commission, in coming to this decision, considered the case of The Mutual Life Assurance Company of Canada v. The Deputy General of Canada [1984] C.T.C. 155, Supreme Court of Ontario (Toronto Motions Court). (**Order #126 and see contra below, Order #M-213**)
- Those portions of the legal account that describes the matters attended to or services rendered would reveal the subject matter on which legal advice was sought or given. The Commission found that this information on a legal account was exempt as being confidential communication between the client and the legal advisor regarding legal advice. (**Order #M-560**)

#### Not Privileged

#### A. Legal Accounts

- Invoices and accounts from a lawyer to his or her client are not automatically covered by the common-law solicitor-client privilege. The institution must determine whether the contents of the legal account relate in a tangible and direct way to the seeking, formulating or provision of legal advice. The Commission ruled that, in this case, the legal account which set out in summary fashion the steps that the law firm took to complete its work assignment, did not contain legal advice and did not reveal any such advice indirectly. The account did not reveal the subjects which the law firm was asked to investigate, the strategy used to address these issues or the result of the advice. The Commission noted that the intent of the legislation would be ill-served by allowing this exemption to be used to shield a non-substantive record of this nature from public scrutiny, particularly in times when public bodies have to ensure that tax dollars are spent wisely. (**Orders #M-213, M-258, P-624, M-274, P-667, P-676 (see contra above, Order #126, M-540, M-560, P-921)**)



- Although a legal account arises out of a solicitor-client relationship, this record category differs qualitatively from legal opinions or other communications which purport to provide legal advice from a lawyer to his or her client. The Commission referred to Re Ontario Securities Commission and Greymac Credit Corp.; Re Ontario Securities Commission and Prousky (1983), 41 O.R. (2d) 328 at 337 (Ont. Div. Ct.) where Southey J. stated that legal accounts are evidence of transactions and not subject to the privilege where the advice and communications are severed from them. The Commission noted that the purpose of the Act was to provide a right of access in accordance with the principle that the exemptions are to be narrowly interpreted. As a result, the test was held to apply to legal accounts which would reveal the subjects for which legal advice was sought, the strategy used to address the issues raised, the particulars of any legal advice provided or the outcome of these investigation. This allows for legal accounts to be severed or information relating in a direct a tangible way to the seeking, formulating or provision of legal advice. In this case, legal accounts that disclosed a tally of the hours spent and disbursements made by the law firms as well as brief narratives of the steps taken to complete the assignments were disclosed. (**Orders #P-624, M-274**)
- Two disbursements listed in the legal account and a portion of a narrative description of services provided by a law firm was held to reveal the strategy used to address the issues raised by the lawsuit and the results obtained and therefore were covered by the privilege. In addition, severances were made of privileged information that disclosed the type of legal advice sought and the legal advice provided. (**Order #P-676**)
- Invoices obtained by forensic experts, who were not solicitors, were not privileged since the privilege does not extend to correspondence which shows only the existence of a solicitor-client relationship. The invoices described in a general way, the steps undertaken by the affected party to conduct its investigation and did not relate to the seeking, formulating or giving of legal advice. (**Order #M-258**)
- A letter from legal counsel to a forensic accounting firm which conveyed procedural instructions in connection with its retainer fee did not reveal the nature of the work to be done. (**Order #M-521**)

#### B. Other

- This exemption does not apply where there is insufficient evidence to establish that the contents of the records were actually communicated by a member of the staff of an institution to the institution's solicitor or that they were confidential. There was also no evidence that the records were created especially for the lawyer's brief where the Town's Director of Planning took notes during an Ontario Municipal Board hearing for possible review with the lawyer at a later date. Minutes of a meeting between the lawyer, director and others to discuss the hearing were also not exempt. (**Order #M-83**)
- The retirement agreement between an institution and a former employee was not exempt under this provision. Contracts are not "communications." In addition, the institution's



lawyer is not the lawyer for the former employee, and the contract cannot be said to be directly related to seeking, formulating or giving legal advice for existing or contemplated litigation. Even though a wrongful dismissal suit was a possibility, the dominant purpose of the preparation of the agreement was not litigation. The agreement is also not prepared by counsel for the purpose of giving legal advice. (**Order #M-173**)

- Ontario Securities Commission documents consisting of lists of questions to be posed to individuals during an enforcement investigation, a memo updating action to be taken in future, a "to do" list or chronology made by senior enforcement counsel, and background notes setting out facts as understood from interviews with individuals and from reviews of documents do not come within the exemption. The Commission noted that there was no evidence that the records were created for use by anyone other than the author or that the records were used for ongoing or anticipated litigation. As well, the records did not contain legal advice. (**Order #P-583**)
- An affected third party could not claim common-law solicitor-client privilege to prevent the disclosure of commercial information supplied to the institution by the third party. The exemption belonged to the head of the institution and, in this case, the head did not claim the exemption. (**Order #P-584**)
- Records that seek or provide information on a privacy compliance review conducted by the Office of the Information and Privacy Commissioner\Ontario but which do not recommend a course of action based on legal considerations and in which no legal opinion is expressed are not exempt. (**Order #P-586**)
- In these instances, the Commission ruled that the exemption did not apply to a record that stated that a response from the legal department was required and to a record that noted the status of a matter involving the City and the appellant. The Commission stated that none of this information was directly related to seeking, formulating or giving legal advice for the purpose of this exemption. (**Order #M-237**)
- Views of a City solicitor contained in a letter sent to a mayor regarding the job performance of an individual who had made allegations of wrongdoing were not governed by the privilege in this case. While the City argued that the letter was inherently advisory, the Commissioner found that the comments were more administrative than legal in nature. (**Order #M-233**)
- A letter written by a solicitor employed by an institution was not exempt where the letter recommends a policy which may be put in place to deal with ministry staff responses to a corporation's proposal. The solicitor had conducted an inquiry on behalf of the ministry's Director of Human Resources. The Commission noted that the letter makes no reference to legal issues and presented no review of the present state of the law. The letter outlined the chronology of events, set out factual findings and presented a proposal. The Commission characterized the letter as an internal investigation report and not a legal opinion. (**Order #P-604**)



- In this case, the Commission found that correspondence from the accounting firm to the Board's Director of Legal Services related to the conduct of the forensic audit investigation and was not prepared either for use in giving legal advice or in contemplation of or for use in litigation. All reports for information, reports and accounts from the accounting firm were forwarded to the legal branch. **(Order #P-710)**
- A memorandum prepared by Crown counsel for a minister's signature was held not to be exempt under this provision. The memorandum contained the wording of a proposed regulation which was enclosed for the signature of the minister. The Commission held that the memorandum did not contain legal advice. **(Order #P-803)**
- A letter written by a Crown Attorney to the Police Complaints Commissioner was not exempt, even though it contained legal advice from another crown, because the Crown Attorney sending the letter was not in a solicitor-client relationship with the Complaints Commissioner. The response from the Complaints Commissioner to the Crown Attorney was not exempt because the response related to the Crown Attorney's attempts to assist a victim of a crime who was not the Crown Attorney's client. Crown Brief Will Say statements are exempt except for the appellant's own statement. **(Order #P-842)**
- Notes prepared by a Director of Education and a Superintendent following a grievance meeting which may have formed the basis for seeking legal advice were not exempt under either Branch when they were not prepared specifically for counsel. **(Order #M-466)**
- A congratulatory note to the solicitor on the outcome of a case is not directly relating to seeking, formulating or giving legal advice and does not qualify for exemption. **(Order #P-921)**

## **In Contemplation of Litigation**

### General

- Records prepared in contemplation of litigation must meet a two-fold test: 1. the dominant purpose that the record is produced is for litigation, and 2. there must have been a reasonable prospect of litigation at the time of preparation. **(Orders #136, 137, P-236, M-516)**
- Papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated, are privileged. The dominant purpose for the preparation of the document must be the contemplation of litigation and the potential for litigation must be more than a mere possibility. The privilege also includes material of a non-communicative nature such as notes made in preparation for the litigation to assist the lawyer. **(Orders #49, 52, 56, 68, 123, M-2, M-19, M-86, M-120, M-121, P-585, M-257, M-280, M-281, P-667, P-677, P-710, M-441)**
- The dominant purpose for the preparation of the document must be in contemplation of



litigation; and there must be a reasonable prospect of such litigation at the time of the preparation of the record--litigation must be more than just a vague or theoretical possibility. Where an institution's solicitor requested that staff prepare notes in respect of a matter that the solicitor expected would result in a grievance arbitration, the notes were exempt under the "litigation privilege." The solicitor swore, in an affidavit, that the dominant purpose for the preparation of the records was contemplation of probable litigation. The fact that the records were prepared prior to the commencement of the litigation, or that the litigation for which they were prepared did not materialize or has since been discontinued, does not mean that the privilege does not apply. (**Orders #M-86, M-173, M-441**)

- This exemption did not apply to records prepared as a result of a complaint made to the Equity Advisor regarding alleged unfairness in a job competition. The Commission ruled that the dominant purpose for preparing the report was to respond to a complaint filed by the appellant concerning a job competition, not in contemplation of litigation. The Commission found that the fact that a subsequent Human Rights Commission complaint was filed and that this "prospect of litigation" was contemplated did not mean that the dominant purpose of creating the records was in contemplation of litigation. (**Order #M-280**)
- The fact that litigation has been discontinued since the records were prepared is not determinative of the issue of whether the records qualify for exemption under this provision. The second branch of the privilege, which deals with records prepared by Crown counsel, may apply even where the common-law privilege would not apply. (**Orders #P-538, P-624, M-281, P-667**)

#### Privilege Applies

- A criminal prosecution file consisting of legal research, correspondence to and from Crown counsel relating to the prosecution, lists of witnesses that may be called and letters regarding matters to be done in preparation for the trial are exempt under the second branch of the exemption. Each of these records was prepared by or for Crown counsel in contemplation of litigation. (**Orders #P-368, P-467 and see below under "Solicitor-Client Relationship," Order #M-52, P-613, P-988**)
- Private investigators' reports, intended for use in litigation, are exempt under the litigation privilege branch of the common-law solicitor-client privilege. The invoices from, and payments to, the private investigators are closely related to their reports and as such are also exempt under this exemption. (**Order #126**)
- Legal advice from the Director of the Crown Law Office, Criminal, to Crown attorneys regarding legal issues arising from the prosecution of drinking and driving offences is exempt under this provision. The memorandum provides an interpretation and analysis of various cases and offers suggestions on how to address them in the context of litigation. As a result, the Commission ruled that the record was prepared for use in litigation. (**Order #P-546**)
- The privilege applies to papers and materials created or obtained, especially for the lawyers



brief for litigation whether existing or contemplated. The adjusters reports in this case were created as a result of the claims filed with the institution. (**Order #M-285, M-502**)

- Records copied for the lawyer's brief for litigation are privileged as long as there was an intention to keep them confidential. In this instance, the common-law privilege remains until the litigation is completed. (**Order #P-667**)
- There is no distinction between matters in dispute before a court or a tribunal. Re-employment hearings considered by an administrative tribunal of the Workers' Compensation Board are properly classified as litigation matters. Therefore, counsel's advice to the board is privileged. (**Orders P-660, M-86, M-162, M-315, P-701**)
- The litigation privilege continued to apply to records when the access request was made at the time records were sent to the solicitor, and at the date of the request, litigation in the form of a complaint to the Ontario Human Rights Commission was underway. (**Order #M-523**)
- Letters sent or received by counsel for the municipality, as well as photographs of the requester's property, both of which were to be used as evidence in the course of prosecuting a By-law infraction, were found to qualify for this exemption. (**Order #M-560**)
- Draft pleadings prepared by counsel for use in an action undertaken by a municipality were prepared for use in litigation. (**Order #M-560**)
- The contents of a Crown Brief kept by the Attorney General Crown Counsel regarding a prosecution is exempt under this provision. (**Order #P-988**)

#### Privilege Does Not Apply

- Where Crown counsel's letter states that the litigation is without merit and that the institution will not be involved, the record is not prepared in contemplation of litigation and this exemption does not apply. (**Order #P-236**)
- The exemption does not apply to records created during an investigation for sexual harassment where they are not prepared by or for Crown counsel. As well, where the records are prepared to fulfil the institution's obligation to investigate in these circumstances, they are not prepared primarily for use in litigation. (**Order #165**)
- A handwritten complaint and investigator's notes compiled during an investigation by the Ontario Human Rights Commission are used primarily for determining whether a public inquiry is warranted and not for a lawyer's use in contemplation of litigation. The privilege does not apply. (**Order #P-403**)
- A police officer's notes that were compiled in the course of an investigation into allegations that the requester was wrongfully convicted of murder are not exempt under this section. The notes were not compiled for use in existing or contemplated litigation. (**Order #P-428**)



- Stage II grievance reports may not be exempt under this provision where they were not prepared by or for Crown counsel. In this particular case, the record was prepared by an employee who was not a lawyer. It was prepared in order to brief senior management. Since neither the author nor the recipient of the record was a lawyer, it is not exempt regardless of whether it was prepared in contemplation of litigation. (**Order #P-441**)
- In this case, an institution retained a researcher to provide advice regarding aboriginal land claims. The dominant purpose of the preparation of the records was for the researcher to comment on work undertaken by another researcher in the land claims field and to indicate further areas for study. The fact that the material provided by the researcher may have subsequently been used in helping to structure legal advice or in litigation does not alter the fact that the records were not prepared for such purposes originally. As a result, the records are not exempt under this section. (**Orders #P-454, P-463**)
- Information related to the handling of a criminal prosecution gathered and transmitted in the form of a letter from the Ontario Provincial Police (OPP) to a Regional Director of Crown Attorneys for the purpose of drafting a response to a letter of complaint addressed to the Attorney General, was not exempt. The information did not constitute a legal opinion, nor did it provide legal advice on a recommended course of action having legal implications. Similarly, the letter prepared after completion of the trial was not prepared in contemplation of litigation. The dominant purpose of the letter from the OPP was to provide information for the drafting of a response by the Attorney General--not litigation. (**Order #P-585**)
- A letter from a City solicitor to another solicitor regarding negotiations in respect of the City's eventual purchase of a property was not subject to the litigation privilege. The Commission noted that the record was not obtained or created especially for the lawyer's brief for litigation, existing or contemplated, nor was there any evidence as to what the litigation was. (**Order #M-237**)
- In this case, the Commission ruled that the litigation privilege did not apply. The records concerned an internal workplace matter in which the records were created, according to the Commission, to provide documentary support for contemplated disciplinary action against the requester, rather than in contemplation of litigation. (**Orders #M-257, M-296**)
- Policies and procedures on prosecutions under the Occupational Health and Safety Act were held not to be privileged. The Commission found that while the record was prepared by Crown counsel, it did not satisfy the second part of the test in that it did not contain a legal opinion. The Commission held that it dealt with policies and administrative procedures, was not based on legal considerations and did not provide a legal opinion based on the state of the law. (**Order #P-776**)
- A memorandum from the regional counsel of the Family Support Plan (FSP) of the Ministry of the Attorney General to FSP enforcement staff regarding the garnishment of the requester's wages was held not to be privileged under either branch of this provision. The Commission



found that the memorandum did not contain legal advice; rather, it contained a chronological description of the relevant facts together with a request that the enforcement staff take certain actions. (**Order #P-792**)

- Records at issue concerned written communications between the Town's legal advisor and the mortgagee of the property and/or its agent who were not in a solicitor-client relationship. In this case, while it appears that litigation was contemplated at the time the letters were written, the Commission determined that records were not created or obtained especially for the lawyer's brief. As well, where communications relate to the resolution of litigation, the privilege does not apply. (**Order #M-516**)

#### Loss of the Privilege when Litigation Ends

- At common law, the solicitor-client privilege may be lost once litigation is terminated. While direct communications between solicitor and client continue to be privileged, derivative communications made in contemplation of litigation cease to be privileged when the litigation is completed. This would include reports collected for the litigation and records copied for inclusion in the lawyer's brief for litigation. (**Order #P-667**)
- While in some cases the privilege is lost on the termination of litigation, this is not the case regarding records exempt under branch two of the exemption. (**Order #M-518**)

#### Crown Counsel

- Crown counsel includes any person acting in the capacity of legal advisor to an institution covered by the Act. This includes outside counsel retained by the Crown. (**Orders #52, 123, 170, P-218, P-538, P-660**)

#### Waiver (See also, cases below under "Solicitor-Client Relationship.")

- Despite the fact that persons other than the solicitor and the client have access to the record, the privilege is not waived unless there is evidence to indicate that the client has waived the privilege available at common-law. In this case, the record was written to and for persons outside the institution, and was given to an institution official by someone other than the addressee. Only the client can waive solicitor-client privilege and although it is clear that persons other than the solicitor and the client had access to the letter, the Commission ruled that the privilege had not been waived. (**Order #136**)
- While only the client may waive the privilege, all the circumstances regarding the disclosure of a legal opinion must be considered to determine whether there has been a waiver. Where the legal opinion was provided by the Reeve of the Township to the affected party intentionally and without any restrictions on its use, the disclosure constituted a waiver of the solicitor-client privilege. (**Order #M-19**)
- In this case, the Commission ruled that fairness did not require the disclosure of a legal



opinion when an institution had disclosed a summary of a legal opinion and not the opinion itself. The Commission stated that the purpose of requiring disclosure of the entire opinion on the basis of implied waiver, would be to prevent any unfairness to the requester, so that the requester would not be misled as to the institution's position or so that the institution could effectively rely on only those elements of the opinion which are advantageous to its position. In a postscript, the Commission noted that the disclosure by the institution of a statement of its legal position represented a useful way of providing some information to the public in circumstances in which it was not required to do so. (**Order #P-579**)

- In this case, the Commission found that an implicit waiver of the privilege had occurred in respect of a letter from a lawyer which was kept in the requester's personnel file. The requester was authorized to view the record at any time when she was acting as the executive secretary to the institution. The institution indicated that it was reviewing its practices with a view towards creating a separate filing system for solicitor's letters and removing them from employees' personnel files. (**Order #M-260**)
- Where a solicitor for an institution sent a summary of an opinion to another private-sector solicitor, he or she waived the privilege. The institution, a Town, had passed a by-law which endorsed all actions taken by the solicitor in the proceedings in question. As a result, the Commission found that the solicitor had acted on behalf of the Town when the summary of the opinion was disclosed and the privilege waived. (**Order #M-291**)
- When Crown counsel sends letters to the appellant's solicitor, who was a third party with an adverse interest in litigation, the privilege is waived. (**Order #P-780**)

### **Confidentiality**

- Where the information sought can be obtained from publicly available court records, it is not reflective of a confidential communication between a client and a solicitor. (**Order #141**)
- Where the institution had sent the appellant the records to which this exemption is claimed, the exemption does not apply and the records cannot be considered confidential. (**Order #163**)
- The privilege did not apply to an invoice submitted to the institution's solicitor who, in turn, forwarded it to the institution for approval and payment. The Commission ruled that the institution's solicitor was merely a conduit for the passing of the documents to the client. The communication originated with the third party and not a legal advisor of the institution. (**Order #M-258**)
- Notes prepared by City staff of meetings attended by certain members of City staff, their counsel, staff of a local hospital and their counsel and consultants were not confidential communications between a solicitor and his or her client. (**Order #M-394**)



## Solicitor-Client Relationship

- The Crown brief that is provided to the Crown prosecutor from a local police force is not subject to the solicitor-client privilege at common-law where the request for the records is made to a local police force. The police are not the clients of the Crown attorney so that the common-law privilege cannot apply. However, Crown briefs are exempt under this section in respect of the provincial Freedom of Information and Protection of Privacy Act because the exemption applies to records prepared by or for Crown counsel (see **Orders #P-467, P-368, P-613**). In **Order P-613**, the Commission ruled that the Crown Law Office Criminal, of the Ministry of the Attorney General, was not in a solicitor-client relationship with the Ontario Provincial Police when it sought advice regarding a potential criminal charge being laid. The records were, however, exempt under the second branch of the solicitor-client privilege in that the records were prepared for Crown counsel for use in litigation. Under the Municipal Freedom of Information and Protection of Privacy Act [MFIPPA], the term "Crown counsel" is not used. The solicitor-client exemption for municipal institutions, such as local police services covered by MFIPPA, uses the term "counsel employed by or retained by an institution." As a result, the exemption under MFIPPA does not apply to the Crown brief because the Crown attorney, who is an employee of the provincial government, is not "employed or retained" by local police services. [Editorial Note: In these instances, police services may wish to consider transferring the request to the Crown attorney's office for their consideration.] (**Order #M-52**)
- The common-law privilege does not apply to a record created by a non-lawyer employee of an institution that contains a review of legal advice the employee previously obtained from her own lawyer, who was not an employee of the institution. In this context, the common-law privilege only attaches to the lawyer's advice, not to subsequent notations by a non-lawyer as to what that advice was. As well, the privilege may be waived by the client where legal advice is sent to a third party. (**Order #P-365**)
- Communications between solicitor and client include those between a solicitor and an Appeal Assistant of the Rent Review Board, who acts as agent of the Board member in the review and analysis of a Rent Review Hearings Board file. Where the draft decision of the board was submitted to the board's legal advisor for advice, it is exempt. (**Order #150**)
- Where a third party reports that certain legal advice was given by a solicitor to a particular client, the privilege would not attach. However, where the record is the device used to communicate the solicitor's advice to the client, it is covered by the exemption. (**Order #170** at p. 65)



- The disclosure of a "final" legal opinion that is subject to solicitor-client privilege does not constitute a waiver in respect of the earlier "draft" legal opinion. The two opinions are separate responses, produced at different times. The second opinion was provided by the solicitor after consultation with his client in respect of the "draft." The earlier "draft" legal opinion is still subject to this exemption. The solicitor-client privilege applies even though the legal opinion was obtained in response to concerns raised by members of the public. (Order #M-2, M-11, M-19, M-59, M-61, M-69, and see also Orders #163, 170 and P-227 where draft records were held to be covered by the solicitor-client privilege.)
- Memoranda prepared by one employee for review by another, where neither is a lawyer, is exempt if it summarizes the advice given by legal counsel for the institution. Here, the employee who obtained the advice from the lawyer is acting as an agent of the person seeking the advice so that the solicitor-client relationship existed. (Orders #P-402, P-424, M-158)
- During a judicial review application, counsel for the third party applicant sent affidavits to the institution's counsel to be sworn by employees within the institution. The affidavits were not privileged because there was no solicitor-client relationship between the institution and the counsel for the third party applicant. (Order #P-475)
- Confidential legal advice provided by counsel for the Ministry of the Attorney General to her client which was an Inter-ministerial committee was exempt. (Order #P-879)

#### **Solicitor-Client Communications**

- Where records are marked up or annotated by Crown counsel for the purpose of giving advice, the exemption applies. (Orders #170, 150, P-381, P-403)
- A note saying that a legal memo is attached or a title page to a legal opinion, which contains a distribution list, is not subject to this exemption. (Order #200)
- Where an investigation into wrongdoing is conducted by Crown counsel, the fact-finding exercise need not be divorced from the advice given concerning the legal implications of those facts. All of the records are exempt. (Order #170 at p. 68)
- The fact that a lawyer reviewed a record that he or she did not create and that is, in itself, unrelated to the provision of legal advice, does not bring that record within this exemption. (Order #P-227)
- Where a letter from one legal counsel to another outlines administrative arrangements, put in place by the lawyer to deal with the transfer of responsibility of a file to a different lawyer, it is not related to the seeking, formulating or giving of legal advice. It is therefore not exempt. (Order #P-398)
- Records that incorporate legal advice given by an institution's counsel are exempt. In this case, the records contain written notations of the verbal legal advice that had been provided



to institution employees from their counsel during a series of meetings. (**Order #P-477**)

- This exemption does not apply to a confidential written communication between a solicitor and client that contains a factual response regarding the status of a pending court application. (**Order #M-157**)
- While portions of a record prepared by counsel and retained by an institution were factual in nature, these were intermingled with material prepared for use either in giving legal advice or for use in litigation. As a result, the exemption applied. (**Order #M-162**)
- Parts of records prepared as a result of an internal workplace allegation of sexual harassment were exempt under this provision. The legal branch of the institution provided advice regarding a memo sent by the investigator to the harassment coordinator and, as a result, the memo was not disclosed. In addition, written legal advice from the institution's legal counsel regarding this matter was exempt. In order to be exempt under this exemption, the communication between the solicitor and client must be directly related to seeking, formulating or giving legal advice. (**Orders #P-550, P-551**)
- The privilege did not apply to an invoice submitted to the institution's solicitor who, in turn, forwarded it to the institution for approval and payment. The Commission ruled that the institution's solicitor was merely a conduit for the passing of the documents to the client. The communication originated with the third party and not a legal advisor of the institution. As well, the communication was not "legal advice" in that it was prepared by forensic and investigative accountants and no recommended course of action based on legal considerations or legal opinion was expressed. (**Order #M-258**)
- The mere fact that a particular type of issue has arisen which the Attorney General will ultimately have to decide on does not automatically make any communication from the Attorney General's legal advisors regarding this issue qualify as legal advice. (**Order #P-984**)
- A confidential letter containing a legal opinion prepared for a municipality by a solicitor regarding renovations to a particular property is exempt because it was directly related to the formulating and giving of legal advice. (**Order #M-542**)

### **Custody or Control**

- Records residing with Ontario government lawyers working as legal counsel to institutions other than the Ministry of the Attorney General are clearly in the custody or control of those institutions and not the Ministry of the Attorney General. The fact that all Ontario government lawyers are employed by the Ministry of the Attorney General does not mean that the Ministry of the Attorney General has custody or control of all the records that they produce. (**Order #134**)
- Records in the custody of lawyers who have been privately retained by an institution are still in the "control" of the institution. As well, s.6(6) of the Solicitors Act confirms that the



records are fundamentally those of the client and that they shall be returned to the client on payment of the fee. In essence, the lawyer holds records as an agent of the client. The Commission found that the principles enunciated in Aggio v. Rosenberg et al. (1981) C.P.C. 7, applied and not the policies of the solicitor's firm. In Aggio, the Court held that records prepared by the solicitor for his or her own benefit or protection, and not chargeable to the client, belong to the solicitor. Similarly, records sent by the client to the solicitor for the solicitor, such as letters, belong to the solicitor. Other records prepared for the benefit of the client belong to the client. In an appeal in this regard, the Commission may give notice to the Law Society of Upper Canada as a potential affected party. (**Orders #M-315, M-371**)

- Records in the custody of a lawyer hired as an investigator to provide an impartial and independent inquiry into a complaint were prepared for his own benefit and do not fall within the categories set out which indicate custody or control. In this case, the terms of the agreement between Hydro and the lawyer setting out the conditions of his employment and the maintenance of the records led the Commission to conclude there is no control over the investigation records by Hydro. (**Order #M-506**)

### **The Exercise of Discretion**

- In this case, the Commission ordered the institution to reconsider the exercise of discretion where the rationale for using the exemption was that whenever the solicitor-client privilege applies, the exemption is applied. The Commission also noted that the discretion must be exercised by the head only and the head may not act under the dictation of the solicitor. In respect of waiver of the privilege, the institution, as client, is the one that may choose to claim the privilege or not. As well, the head is required to consider the merits of the requester's particular case. (**Orders #M-285, M-286**)



FIPPA

s.20

DANGER TO SAFETY OR HEALTH

MFIPPA

s.13

A head may refuse to disclose a record where the (FIPPA)/whose (MFIPPA) disclosure could reasonably be expected to seriously threaten the safety or health of an individual.







- The Commission confirmed that reasonable expectation of harm required that the institution establish a clear and direct linkage between the disclosure of the information and the harm alleged. The Commission approved of the position taken by the Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture) [1989] 1 F.C. 47 at 59-60, where the Court indicated that a "reasonable expectation of probable harm" was required. It also approved of the Federal Court Trial Division's decision in The Information Commissioner of Canada v. The Prime Minister of Canada, unreported, November 19, 1992, where the Court stated that the mere "possibility" of harm was not sufficient. The Court held that descriptions of possible harm, even in substantial detail, are insufficient in themselves. Justice Rothstein stated that:

The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantial the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a Court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged...While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality, would...be more difficult to satisfy.

(Orders #P-534, P-588, M-315, P-837)

- Sufficient evidence must be presented to support the application of this exemption. The fact that the records referred to the transfer of an involuntary patient from one institution to another was insufficient. (Order #74)
- The reasonable expectation must not be fanciful, imaginary or contrived. Disclosure of a Minister's briefing response regarding to a murder investigation would not trigger this exemption where no witnesses are referred to and where no factual basis has been laid to establish safety concerns. (Orders #188, P-280, P-312, M-333)
- While threatening letters written by the appellant may be disclosed to the appellant, the letters provide evidence of a serious threat that could be used to exempt other records not written by the appellant. (Order #P-259)
- This exemption did not apply where a parent sought access to teachers' notes of his children's comments about the parent. The substance of the notes was discussed at a meeting that the parent attended. It was therefore not reasonable to expect that disclosure of the notes would result in harm to the children. (Order #M-100)



- The expense claims of an employee were accessible even though they disclosed where he had lunch. The fact that the employee had been threatened in the past was not sufficient to apply this exemption to the information concerning the locales in which this individual ate business lunches. The Commission found that there was not the degree of predictability or pattern regarding the locales in which the employee conducted his business lunches to warrant the application of this exemption. (**Order #M-333**)
- In this case, the Commission was not satisfied that there was a reasonable expectation of probable harm where there was a significant lapse of time (December 1991 and May 1994) between the events related to the disciplinary proceedings and the appeal. (**Order #M-321**)
- A listing of all police officers and civilian personnel of a police force including name, rank and position was found to be exempt under this provision. Because of the inherent dangers to the physical safety of police force employees, the identification of individuals as police officers could reasonably be expected to make their work more dangerous. (**Order #M-465**)



(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
- (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
- (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
- (e) for a research purpose if,
  - (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
  - (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
  - (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

#### CRITERIA RE INVASION OF PRIVACY

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,



- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny (FIPPA); the institution to public scrutiny; (MFIPPA)
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

#### PRESUMED INVASION OF PRIVACY

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where (FIPPA)/if (MFIPPA) the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
- (d) relates to employment or educational history;
- (e) was obtained on a tax return or gathered for the purpose of collecting a tax;



- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

#### LIMITATION

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution (FIPPA)/or a member of the staff of a minister; an officer or employee of an institution (MFIPPA);
- (b) discloses financial or other details of a contract for personal services between an individual and an institution or; (FIPPA)/ MFIPPA)

- (c) discloses details of a licence or permit or a similar discretionary financial benefit conferred on an individual by an institution or a head under circumstances where,

No comparable section

- (i) the individual represents 1 per cent or more of all persons and organizations in Ontario receiving a similar benefit, and
- (ii) the value of the benefit to the individual represents 1 per cent or more of the total value of similar benefits provided to other persons and



organizations in  
Ontario.

REFUSAL TO CONFIRM OR DENY EXISTENCE OF RECORD

(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.



ss.(1)(a)

Agents for Requesters

- Where an individual purports to act as an agent under this section, the Commission must balance the right of the individual to be represented by an agent with the institution's obligation to verify the identity of an individual seeking access to his or her personal information and whether or not the agent is properly authorized to obtain such information. If proper authorization cannot be obtained, the institution may either: notify the individual whose personal information is at issue and provide him or her with an opportunity to provide representations; or may deal with the validity of the authorizations as a preliminary matter. In determining whether the institution acted reasonably in refusing to accept certain authorizations, the following factors are relevant: whether the personal information is very sensitive, whether the authorizations preclude the institution from verifying the consent and whether or not the individuals who have allegedly consented have responded to the request for verification made by the institution. Special care should be taken where personal information is being requested about the treatment of vulnerable individuals. Institutions should not assume that requests for personal information by agents are invalid; rather, they should discuss the matter with the individuals involved before determining whether or not to accept the authorizations. (Orders #P-533, M-71, P-455)

Consent

- Once the individual has consented to the disclosure of the personal information, this exemption does not apply. (Orders #M-8, M-52, M-84)

Implied Consent

- Where a person's name appears on printed letterhead, consent to the disclosure of the letterhead may be implied. A letterhead is by its nature used widely and publicly and the privacy protection of the Act does not attach to information that can be gleaned from the presence of a name on a letterhead. (Orders #138, 202)
- Where an individual voluntarily signs a petition, his or her consent to disclosure may be implied. (Orders #154, 171, 172)
- While lottery winners are advised in writing that their identities could be published in the newspaper, and that in order to collect the prize they must agree to this, they do not implicitly consent to the disclosure of their identities to other individuals under this section. Similarly, consent may not be implied in respect of the disclosure of lists of winners to the public on request. This list is not a public record, but is a new record



created from records that have been made public. (**Orders #180, 181, M-68**)

- In this case, the Commission found that the affected party had not consented to the release to his or her insurance company of the results of his or her blood analysis, taken as part of a police investigation into a motor vehicle accident. While the insurance company suggested that, by virtue of two provisions in the Ontario Automobile Policy, the affected party had consented to the disclosure, the Commission held that the provisions did not authorize third parties to disclose relevant records. The Commission ruled that the provisions only bound the third party to produce relevant records. (**Order #P-731**)
- A typical patient receiving health services would understand that the health card version code may be disclosed by the physician to the Ministry of Health for payment purposes. Thus one might be able to imply consent for the disclosure of the version code by the physician to the ministry. However, the Commission found that this does not mean that the patient has given implied consent for the Ministry to disclose the version code to a physician requesting the version code from the ministry. (**Order #P-867**)

**ss.(1)(b)**

- The Commission ruled that this section does not apply in a situation in which the requester and his family suffered ill health after receiving harassing phone calls. (**Order #M-525**)

**ss.(1)(c) (See as well, cases under s.37 [FIPPA] \ s.27 [MFIPPA].)**

Not "Public Records"

- In order to satisfy this exception, it must be shown that the personal information was collected and maintained "specifically" for the purpose of making it available to the general public. In this case, the names and addresses of landowners who owned designated Areas of Natural and Scientific Interest were available to the public, but there was no evidence to show that it was maintained specifically for this purpose. As a result, the exception to the exemption did not apply. (**Orders #P-559, P-755**)
- Even though records are submitted pursuant to a statute that indicates that they will be made publicly available, the records may not be "maintained" for the purpose of creating a public record. Where records containing errors were never made available to the public, this provision does not apply. (**Orders #P-318, P-319**)
- Personal information may be public in one sense and still not be publicly available as contemplated by this section. For example, the names and addresses of lottery winners are made public in newspaper accounts when the winners are announced. Winners agree that this be done. This does not mean that the record is a "public" record for all times and in all contexts. Similarly, a criminal record may be disclosed in a public trial but this does not mean that it is a "public" document as envisaged by this provision. In each of these instances, access to the personal information must be made in consideration of the factors



in ss.(2) and (3) of this exemption. (**Orders #180, 181, M-68**)

- Witnesses who provide statements to the police do not give up their privacy rights simply because there may be a trial in the future and they may testify in open court. The fact that personal information may be disclosed in a public trial does not mean that the individual who will be involved in the trial waives his or her privacy rights. This is particularly so where the public proceeding has not yet commenced. (**Order #P-392**)
- The badge numbers of police officers are not covered by this exception to this exemption. Even though the badge numbers are public in one context, they are not maintained as a public record in all contexts. Therefore, where police officers during training sessions note their identity by badge number, they are not doing so to create a public record. In this context they are acting as students and not in their official capacity as police officers. (**Order #M-116**)
- The Commission considered that the names of inmates who were detained in a detention facility prior to trial were personal information that was not publicly available. (**Order #P-657**)
- The fact that something ought to be public was not sufficient; it was necessary for the requester to provide evidence that the record was public in order for this provision to apply. (**Order #M-290**)
- Vehicle licence registration numbers of individuals who received parking tickets while parked at a specific location was not a public record. Parking tags are issued for law enforcement purposes and not for the purpose of creating a record available to the general public. (**Order #M-336**)
- Despite the fact that apprentice electricians are required to be registered under the Trades Qualification Act, the names and other identifying information about these individuals is not maintained specifically for the purpose of creating a record available to the general public. (**Order #P-755**)

#### "Public Records"

- Land registry information that is available to the public upon request at land registry offices is a public record. In this case, the information was provided to the institution by an individual who obtained it by doing a title search at the land registry office. The Commission found that the disclosure would not be an unjustified invasion of privacy. (**Order #P-480**)
- Although a municipal by-law requires that certain personal information concerning the driver and owner of licensed taxis must be displayed in taxis for the benefit of passengers, the public display of the personal information does not necessarily trigger this exemption. In this case, the Commission felt that the personal information about individual taxi licence



holders maintained by the Licensing Commission was not collected and maintained specifically for the purpose of creating a record available to the public. Rather, the Commission felt that it was collected for the purpose of assisting the Licensing Commission in the regulation and licensing of the taxi industry and was thus not exempt under this section. **(Order #M-448)**

**ss.(1)(d)**

- The phrase "expressly authorized by statute" requires that specific types of personal information collected be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute, i.e., in a form or in the text of the regulation. Section 45 and 65 of the Labour Relations Act, which state that "no employer shall participate in or interfere with the formulation, selection or administration of a trade union or the representation of employees by a trade union" is not authorization to disclose personal information to a trade union. **(Order #M-292)**
- In this case, the requester sought access to his personal information contained in the Crown brief prepared in respect of his prosecution for assault. The requester stated that since he was entitled to pre-trial disclosure of the information, he was entitled to the information under this provision. The Commission disagreed and held that this provision did not apply. **(Order #M-317)**
- The phrase "expressly authorized by statute" should be narrowly interpreted to require that the specific types of personal information to be disclosed be expressly described in the statute. S. 16(5) of the Divorce Act which provides that an access parent has a "right to make inquiries, and to be given information, as to the health, education and welfare of the child" does not fall within the terms of ss.21(1)(d) FIPPA/ss.14(1)(d) MFIPPA. S.16(5) of the Divorce Act is too broadly worded to meet the requirements of s.21(1)(d). While categories of personal information are identified in s.16(5) of the Divorce Act, the section lacks the specificity required by s.21(1)(d). **(Order #M-484)**

**ss.(1)(e)**

- "Research" means a systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions and an endeavour to discover new or to collate old facts by the scientific study or by a course of critical investigation. **(Orders #P-666, M-336)**
- In order for a requester to meet the requirements of this provision, he or she must provide evidence that the conditions in the clauses in (1)(e)(i), (ii) and (iii) have been satisfied. **(Order #M-292)**



General

- This provision is an exception to the mandatory exemption, which prohibits disclosure of personal information. The party seeking to apply this exception bears the burden of establishing that the exception applies. In the absence of any evidence that the disclosure of the personal information would not constitute an unjustified invasion of personal information, the mandatory exemption applies and the personal information will not be disclosed. (**Orders #M-97, P-538, P-539, P-551, P-563, P-564, P-432, P-441, M-113, M-114, M-115, P-436, M-104, M-109, M-197, M-240, P-567, P-576, P-594, P-620, P-622, P-764, M-394**)

Not An Unjustified Invasion of Privacy

- In this case, the Commission ruled that there were exceptions to the personal information exemption. Where nothing in ss.(2) or (3) applies, the information is not an unjustified invasion and must be released. (**Order #P-292**)
- Requests for access to the names of individuals who have made requests under the Act must be determined on a case-by-case basis. Since there are no presumptions in ss.(3) that would apply, the factors in ss.(2) must be considered. In this particular case, the disclosure of the name was not an unjustified invasion of privacy. (**Orders #M-32, and see also #27, 78, P-216, P-370**)
- The disclosure of summaries of will-say statements that may have been used at a hearing held under the Public Service Act, regarding the requester, would not be an unjustified invasion of the potential witnesses' personal privacy. The records in respect of the internal employment-related matter would have been available to the requester if he had chosen to attend the hearing and if the witnesses had testified. (**Order #P-312**)
- Where the opinions of individuals have been publicly debated, disclosure of the opinions does not constitute an unjustified invasion of personal privacy. (**Orders #66, P-323**)
- It was not an unjustified invasion of privacy in this case to disclose the names of volunteers who provide information to an institution as part of their responsibility as volunteers. (**Order #M-8**)
- The names and addresses of the Board of Trustees of a home for senior citizens are filed with the Ministry of Consumer and Commercial Relations under the Corporations Information Act. As such, disclosure of this personal information would not constitute an unjustified invasion of privacy. (**Order #P-528**)
- While the personal information remains personal for 30 years, the Commission found that



the privacy interests diminished because the deceased had been dead for 23 years and the information related to events, albeit criminal charges, that occurred between 1957 and 1969. Moreover, the Commission noted that under the federal Privacy Act information is no longer considered to be personal if the person has been deceased for 20 years as opposed to the 30 year period under this Act. Had the criminal record of the deceased, not been destroyed it would have been available under the federal legislation. Consequently, the criminal record and other information not subject to the presumed invasion provision in ss.(3)(b) was disclosed to the personal representative of the deceased. (**Order #M-426; see also M-97**)

- A letter of resignation submitted by a named Parent-Teacher Association President at a particular school was disclosed under this provision. The letter, addressed to all the parents of the school, contained the personal information of both the author and the individuals named in the letter. It had been read at a public gathering at the school and the individuals referred to in the letter were advised that it was to be sent to the students' homes. (**Order #M-425**)
- Disclosure of the names of the duty officer and dispatchers of a Police Service where a complaint was made was not an unjustified invasion of privacy. The public ought to be able to know the identities of individuals contacted in a public body. (**Order #M-510**)

#### Unjustified Invasion of Privacy

- Disclosure of the names and addresses of individuals who have enrolled in an apprenticeship program be an unjustified invasion of privacy. According to the contract entered into by the apprentices, the personal information was not collected to make it available as a mailing list to marketing firms. This was also true of birth information which, as a matter of practice, had always been provided in confidence. (**Orders #P-307, P-309**)
- In this case, disclosure of the personal information of persons involved in setting up a Women's Health Clinic was held to be an unjustified invasion of personal privacy. (**Order #149. See also Order #151**)
- The disclosure of names included in a briefing note to a Minister, in respect of a murder investigation in a correctional facility, constitutes an unjustified invasion of the personal privacy of the individuals referred to in the briefing note. (**Order #188**)
- Disclosure of the names of individuals who have been issued hunting licences would be an unjustified invasion of their privacy. (**Order #P-213**)
- Disclosure of the education and employment histories of consultants who were bidding on contracts would unjustifiably invade their privacy. (**Order #P-222**)
- Disclosure of the name of a deceased individual would constitute an unjustified invasion of



privacy where no argument weighing in favour of disclosure was provided on appeal. **(Order #M-97)**

- The natural father in this case did not obtain access to his child's student records. By virtue of the divorce decree he did not have custody of his child, and despite the fact that the decree absolute granted him the right to obtain education-related information about his child, the disclosure in these circumstances was held to be an unjustified invasion of the privacy of the child, her mother and her mother's spouse. **(Order #M-104)**
- The disclosure of the names, addresses and in some instances, the telephone numbers of individuals who responded to a market survey regarding their interest in buying real estate was not disclosed as a result of this provision. The Commission noted that disclosure was not necessary to submit the institution to public scrutiny and that there were no other factors in ss.2 that would favour disclosure of these records. **(Order #M-235)**
- The names of individuals who responded to a poll were not disclosed under this provision. **(Order #M-340)**
- Disclosure of the social insurance number of individuals was held to be an unjustified invasion of the privacy of those individuals. **(Order #P-762)**
- Disclosure of the number of overtime hours worked by a police officer on a particular program was not disclosed under this provision. While the Commission found that no factors in ss.(2) or (3) militated against disclosure, the Commission held that the exemption is mandatory and in the absence of considerations that would support release, the records were not to be disclosed. **(Order #M-438)**

ss.(2)

#### General

- Once a presumption has been established under s.21(3) [FIPPA] \ s.14(3) [MFIPPA], it may only be rebutted by the criteria set out in s.21(4) [FIPPA] \ s.14(4) [MFIPPA] or by the "compelling public interest" override in s.23 [FIPPA] \ s.16 [MFIPPA]. **(Re John Doe et al., and Information and Privacy Commissioner et al.(1993), 13 O.R. (3d) 767 (Div. Ct), M-170, P-528, P-538, M-202, P-541, M-544)**
- This list of factors is not exhaustive. The word "including" requires the head to consider circumstances that do not fall under the listed criteria. For example, ensuring or restoring of public confidence in an institution may be a factor in some cases. In addition, the recessionary times may warrant the large expenditures of funds be subject to greater public scrutiny. **(Orders #99, P-237, P-312, M-129, M-173, M-278)**
- In this case, the Commission ruled that where a factor in ss.(2) was relevant to non-



disclosure of personal information, the institution must establish a sufficient connection between the release of the records and the possible harm to the affected parties. (**Order #P-634**)

- The authority for disclosure of personal information under s. 42 [FIPPA] \ s.32 [MFIPPA] is not relevant for an access request. (**Orders #M-96, P-810**)
- The Commissioner held that merely by making the Criminal Injuries Compensation Board (CICB)CICB proceedings relevant to a lawsuit, the family has not waived any claim to privacy under this legislation. Nor should the family have a diminished expectation of privacy as a result of their application to the court.(**Order #P-919**)

#### Factors Not Relevant to Disclosure

- Disclosure under this part of the Act is, in effect, disclosure to the world and not just to the requester. Therefore, where the requester, a union, wanted access to the home phone numbers of members of the union, it was held that the disclosure would constitute an unjustified invasion of the union members' privacy. (**Orders #M-96, M-206**)
- Where a requester asserts that he or she needs the records because a complaint to the Human Rights Commission may be made, this assertion alone is not a compelling ground for disclosure. (**Order #97**)
- Release of a name, address and telephone number of an applicant's agent or contact person may not necessarily constitute an unjustified invasion of personal privacy. (**Order #53**)
- Administrative ease is not a rationale for overriding the privacy provisions. As a result, administrative ease is not a relevant factor in determining whether the disclosure of personal information at issue would constitute an unjustified invasion of personal privacy. (**Order #M-118**)

#### Factors Relevant to Disclosure

- This section requires the head to consider all relevant circumstances, including matters that are not listed. One such unlisted factor is that the information relates to an individual who is deceased. On death, the privacy interest in the personal information of the deceased diminishes. However, this may not be so depending on the circumstances of the death. In certain cases the personal information of the deceased was disclosed. This was so even though the requester was not the personal representative of the deceased under s.54(a) [MFIPPA] \ s.66(a) [FIPPA]. As a result where s.54(a) [MFIPPA] / s.66(a) [FIPPA] is not satisfied, the factors in ss.(2) may be considered. Despite this, in **Order #M-206** the deceased representative did not obtain the records because the circumstances of the death were related to an allegation of criminal wrongdoing and the Commission ruled that disclosure would be an unjustified invasion of privacy in the circumstances. (**Orders #M-50, M-51, M-153, M-206**)



- The disclosure of personal opinions that have been publicly debated does not constitute an invasion of personal privacy. (**Order #66**)
- Subsection (2) contains no factors that would lead to the non-disclosure of names on a petition. (**Order #171**)
- In this case, the public nature of a petition signed by petitioners requesting a public inquiry to investigate the affairs of a Township was an unstated factor weighing in favour of disclosure of the names and addresses of the petitioners. (**Orders #171, P-516**)
- An unstated but relevant factor under this provision is that the disclosure of personal information could be desirable for ensuring public confidence in the integrity of the institution. In this case, this factor resulted in the disclosure of substantial parts of an employee severance package. The Commission considered the following matter in arriving at this conclusion: The severance package involved a large amount of public funds, agreements involved senior civic employees with a high public profile and the need for prudent expenditure of public funds. (**Order #M-173**)
- The fact that the deceased had been dead for 11 years was a factor weighing in favour of disclosure of information to his daughter related to his prior conviction and incarceration. The Commission ruled that the father's right to privacy diminished with his death and with the passage of time. However, the Commission also noted that the nature of the offence could not be disclosed. It also ruled that the fact that the requester is the daughter of the deceased was not relevant to disclosure because disclosure under this Part of the Act is the equivalent of disclosure to the world (as was decided in **#M-96**). Moreover, the options for disclosure under s.42 [FIPPA] \ s.32 [MFIPPA] are not relevant to disclosure under this Part of the Act. (**Order #P-679**)
- This factor weighed in favour of disclosure of personal information relating to an investigation into the disappearance and death of a Crown ward in order to ensure public confidence in the integrity of an institution. One of the purposes of the investigation was to determine whether the Ministry of Community and Social Services' policies and procedures regarding such incidents needed to be amended. (**Order #P-991**)

ss.(2)(a)

## General

- A demonstration of personal interest by a judge after the conclusion of a case does not constitute any evidence of public concern or public interest in the subject matter of the judge's private interest. This factor cannot be used to rebut a presumption in ss.(3). Only the compelling public interest override can rebut a presumption that arises as a result of an investigation into a possible violation of law (ss.(3)(b)). (**Re John Doe et al. and Information and Privacy Commissioner et al. (1993), 13 O.R. (3d) 767 (Div. Ct.)**)



- In some instances, the extent of disclosure that has already been made by the institution is sufficient to subject the activities of the institution to public scrutiny. (**Orders #P-273, P-282, P-328**)
- There must be a public demand for scrutiny of the institution, not one person's personal view or opinion is necessary. The requester must demonstrate that the activities of the institution to which the record relates have been publicly called into question. (**Orders #P-347, P-352, M-35, M-84, M-173, M-206, P-643, M-278, M-290**)
- In this case, the allegation of conflict of interest in the awarding of a tender by an institution was not sufficient to apply this factor. While the first part of the test had been met in that a press conference was called, the requester did not persuade the Commission that the disclosure was necessary to submit the institution to public scrutiny. Access to the actual proposal was provided and it was determined that it was unnecessary to provide the personal information of the individuals listed as references. (**Order #M-290**)
- This factor did not result in disclosure of the names and addresses of individuals who signed an attendance sheet at a public meeting held to discuss a development proposal in a particular locale. While the meeting was public, this did not mean that the names, addresses and phone numbers of attenders should be disclosed in the form of a list. However, the comments made by the attenders may be disclosed since without the names they did not disclose the identity of the individuals who made them. (**Order #M-350**)
- Since the Act makes explicit provision for protection of the privacy of deceased individuals, the unlisted factor identified in order M-50 should only apply in exceptional circumstances. (**Order #P-945, M-50**)

#### Relevant to Disclosure

- This factor is relevant to the release of a report prepared after an investigation into the alleged misuse of public funds regarding the submission of expense claims. Government employees who submit expense claims for reimbursement should expect that they may have to justify them within the institution as well as to the public. (**Orders #P-256, P-433, P-721**)
- This factor was relevant to disclosure of an investigation report regarding allegations of financial improprieties in respect of expense claims. The records, in this case, were created during a recessionary environment which has placed an unparalleled obligation on government agencies to ensure that tax dollars are spent wisely. These sort of investigations are inherently subject to a high degree of public scrutiny. The Commission ruled that in these instances the threshold to establish that the 'activities of a ministry have been publicly called into question' should be modest in nature. The threshold will be satisfied where there is some evidence that a public interest has been expressed about the circumstances which led to the creation of the record. This factor was pivotal even if other factors which would normally weigh against disclosure existed. However, the



Commission ruled that the names of the individuals involved ought not to be included even where this information may be ascertainable by certain knowledgeable individuals.

**(Orders #P-634, M-278, P-663, M-290, P-721, P-735)**

- Disclosure of information regarding which councillors participated in the voluntary unpaid leave program is desirable for the purpose of submitting the activities of the institution to public scrutiny. Persons holding an elected position such as regional councillor reflect directly on the Region. These elected officials must have a reduced expectation of privacy. This is exemplified by the fact that the municipal treasurer is required by law (s.247(1) of the Municipal Act) to submit an annual report to council which contains specific information regarding an individual councillor's remuneration and expenses. To ensure public confidence in the integrity of the institution and to facilitate and foster public accountability, the records that reveal which councillors agreed to participate in the voluntary unpaid leave program was disclosed. Information regarding which pay period the councillor wanted the deduction to be taken from his or her pay was not disclosed to protect the privacy of the councillor. **(Orders #M-129, M-173)**
- This factor was relevant to the disclosure of the dollar amounts of retirement agreements entered into by high-ranking government employees. The Commission ruled that the presumed invasion factor in ss.(3)(f) did not apply. In this case, the retirements were the subject of considerable public interest and was reported on by the press. The negotiation of the agreements was a matter of serious public debate. The Commission found that the contents of the retirement agreements warranted a high degree of public scrutiny and that disclosure was necessary to enhance public confidence in the integrity of the institution. This was particularly true because large amounts of public funds were involved. The Commission noted that this was particularly true to ensure that tax dollars are spent wisely in the current recessionary climate. While disclosure was ordered, the names of the individuals were not disclosed because the disclosure of the names was not necessary to achieve public scrutiny. **(Orders #M-173, M-204 and see M-196 where the Commission, by postscript, urged institutions to make the dollar amounts in severance packages publicly available, with the names of the individuals severed.)**
- The monetary entitlements of a senior employee of an institution on termination were held to be accessible in consideration of this provision. The departure of this senior municipal officer was the cause of considerable interest which extended beyond the community he served. The contents of agreements entered into between institutions and senior municipal employees represent the sort of records for which a high degree of public scrutiny is warranted. Therefore, certain records relating to the employment and release agreements between a village and its former Chief Administrative Officer (CAO) were released. This was so even though the name of the former CAO had been released by the institution. **(Order #M-419)**
- In this case the Commission found that this factor militated in favour of disclosure of an audit report dealing with the management of a publicly funded residence for youth. The current recessionary environment requires that monies be well spent and this responsibility



occurs whether the funding is internal to an institution or is given for service to a third party. However, this adequate level of public scrutiny may be achieved without disclosing the names or other identifying information of the individual mentioned in the records. Thus, the disclosure of identifying information was held to be an unjustified invasion of privacy. (**Order #P-721**)

- This provision was applicable to the disclosure of an investigative report into staff misconduct in a home for the developmentally handicapped. The home was funded by the institution and the investigation conducted by the institution was done because of serious allegations not only about the former employee of the home but also about the administrative operations of the home. The fact that the investigation was to take place was announced in the media. The Commission found that the information contained in the report about the former employee and two affected persons was available in consideration of this provision based on the relationship between the home and the institution, the seriousness of the allegations and the fact that it is critical that such incidents not be permitted to recur in the future. This was so despite the fact that the information was held to also be highly sensitive. However, the Commission held that the information about a third affected person should not be disclosed because her actions had not been called into question and the information was included in the report as an example of a situation where accountability for public funds should be more closely monitored. The Commission noted that the information in respect of this third person was highly sensitive and that disclosure would unfairly damage her reputation. (**Order #P-828**)
- The Commission found that this factor militated in favour of the disclosure of an out of court termination settlement between an institution and its former employee. The Commission found that dollar amounts and level of employee were not determinative of the issue. It was noted that the public's concerns over the prudent use of public funds is based on the use to which and the manner in which an institution applies monies, such as tax dollars, received from the public. The Commission held that this should be a relevant consideration in each case. However the Commission found that an adequate level of public scrutiny may be achieved without disclosing the name or identifying information of the former employee. This was so even though knowledgeable individuals may know the identity of the individual. (**Order #M-441**)
- This factor applied to personal information about a Crown Ward and another individual relating to the Crown ward's disappearance and subsequent attempts to locate him. The Commissioner noted that the disappearance and death of the ward generated a great deal of publicity and press coverage. (**Order #P-991**)

#### Not Relevant to Disclosure

- Disclosure of signatures of residents of a mental health facility is not necessary to submit an institution to public scrutiny. (**Order #P-387**)
- This provision is not relevant regarding the disclosure of the names of police officers, who



had written a research paper as students at a police college concerning the citizen complaint system. The views and opinions were expressed by these officers as students during an academic exercise and need not be disclosed to submit the police to public scrutiny. **(Order #M-116)**

- This section did not apply in respect of the disclosure of the score of a successful candidate in a job competition to a third party. The fact that the ground rules for the competition may have been changed after the applications were received was not sufficient to rebut the presumption in ss. (3). **(Order #M-135)**
- This provision is not relevant to the determination of whether records about an alleged assault on a student in a school ought to be disclosed. In this case, the newspaper articles about the event concerned the safety of students in the school. The concerns were not about employees or representatives of the school board and did not indicate that the public had questioned the board's activities in relation to the incident. Concerns about the prevention of future assaults were not sufficient in this case to apply this provision. **(Order #M-143)**
- This provision did not apply in respect of a custodial parent's access to his son's records, created as a result of a custody and child protection dispute. The judge during the proceeding made public statements critical of the children's aid society's conduct. The Commission ruled that: the parent had received a significant amount of the information through the litigation process, that the judge's comments were publicly available, that the Ontario Ombudsman's office was investigating the matter and that the information fundamentally is sensitive personal information about a child. In these circumstances, this provision was held to not apply. **(Order #P-673)**
- Disclosure of the number of hours worked by a police officer was not necessary to submit the institution to public scrutiny. The Commission considered that only very modest sums were expended for overtime work over the five year span of the request. **(Order #M-438)**
- In the context of a request for competition records, a requester's claim that the competition process was unfair was insufficient to demonstrate that disclosure of competition records was desirable to subject the government to public scrutiny. **(Order #P-924)**

ss.(2)(b)

- This provision did not result in the disclosure of the resume of an employee of the Fuel Safety Branch of the institution because the disclosure could not reasonably be connected to the promotion of public safety. **(Order #P-347)**
- This provision was relevant to the disclosure of records that document the circumstances



surrounding the inadvertent release of an inmate from a jail. (**Order #P-289**)

- The Commission was not satisfied that this factor applied to the disclosure of records regarding an alleged assault that took place at a school. The public was already aware of the incident through newspaper articles and further disclosure of the individuals involved would not assist in promoting health and safety. (**Order #M-143**)
- This provision was not relevant to the decision not to disclose the list of names and addresses of owners of land designated by a ministry as Areas of Natural and Scientific Interest. The Commission did not find that the disclosure of this information would be reasonably connected to the purchase of land in these areas. (**Order #P-559**)
- The fact that the records containing personal information consist of a safety survey of a ministry's Air Fleet does not automatically mean that this provision applies. Here the information pertained to employees' perceptions of certain individuals rather than to safety issues. (**Order #P-964**)

ss.(2)(c)

- This provision is not intended to create an exception to the mandatory personal information exemption for the purpose of making mailing lists available to the public for marketing purposes. (**Orders #P-307, P-309**)
- This section does not apply to the disclosure of personal information to enable someone to determine the type of legal representation that he or she requires. (**Order #M-84**)

ss.(2)(d)

General

- In order for this section to be relevant, the following factors must be established: 1. the right in question is a legal right, which is based in common law or statute; 2. the right is related to a proceeding which is either existing or contemplated; 3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and 4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (**Orders #P-268, P-304, P-312, P-322, P-328, P-341, P-355, P-358, P-362, P-375, P-387, P-377, P-392, P-401, M-28, M-38, M-42, M-55, M-82, M-84, P-412, P-434, P-443, M-119, M-120, M-122, M-125, P-447, P-450, P-469, P-470, P-480, P-485, P-510, P-515, P-541, P-550, M-212, M-230, M-222, P-606, P-611, M-256, M-257, P-621, P-634, P-642, P-643, P-663, P-665, P-657, P-651, P-654, P-658, P-673, P-685, M-327, P-712, M-396**)
- In this case, while the Commission believed that certain parts of the test in this exemption could be made out (see above), it noted that the requester had not met the necessary threshold of proof regarding parts 3 and 4 of the test. The requester did not show why he



needed the personal information of his estranged wife and child, who were residing in a women's shelter, to ensure that he gets a fair trial in an upcoming custody hearing. The requester had failed to show a direct link between the information and the fair determination of his rights. (**Order #P-642**)

- Where disclosure procedures exist outside of this Act, disclosure under this Act is not necessary for a fair determination of rights. (**Order #139**)
- The fact that an alternative means of disclosure is available at a certain stage in another type of proceeding does not mean that this provision is not a relevant factor in determining whether disclosure is available. For example, if the information is relevant to a fair determination of rights at a grievance hearing or to conduct civil litigation, this provision may still be relevant despite the fact that opportunity exists for pre-hearing or pre-trial disclosure of documents. (**Orders #M-122, P-447**)
- Although release of a person's name and address may be relevant to a fair determination of another's rights, disclosure must be balanced against the protection of the privacy rights of individuals. (**Orders #12, P-224**)
- The application of this provision may require a finding that the disclosure of the records is sufficiently relevant to a fair determination of rights as to outweigh the privacy interest of the other affected individuals. (**Order #P-274**)
- The victim of an alleged offence does not have an absolute right under the Act to view all material related to the allegation. The victim's rights must be balanced against the named individual's right to the protection of his or her privacy. (**Order #P-392**)
- The test for the application of this provision is not met by an assertion that legal action is necessary to redress loss of financial and professional reputation. (**Order #P-375**)

#### This Provision Is Not Relevant

- Even where this provision is satisfied, the address of an individual may not be released because it is not required in order that the appellant proceed with a civil claim. The institution had released the name of the individual and therefore the civil action could proceed on the basis of that information. (**Order #M-39**)
- The identity or status of the requester is not a relevant consideration in this regard. Disclosure under this Part of the Act is, in effect, disclosure to the world and not just the requester. (**Orders #M-96, P-578**)
- This provision is not relevant to a determination as to whether elected officials in a municipality have the "right" to access the number of hours worked by employees of the municipality. This is not the type of "right" contemplated by this section. (**Order #M-35**)



- This provision does not apply to a request for records regarding a complaint that was investigated under the Police Act. Procedures available under the Police Act provided the appellant with the right to a fair hearing and an opportunity to respond to the charges. In these circumstances, the presumption in ss.(3)(b) was not rebutted. (**Order #P-285**)
- Disclosure of records was not relevant to a fair determination of rights where the institution had decided that no repercussions would flow from the complaint because no rights were at risk. (**Order #P-223**)
- This provision does not apply where an appellant seeks complaint information that was the basis for him being denied the lease of a property. The appellant said that he needed the information to "defend and vindicate" himself, but he did not provide any evidence of any legal right that may apply. (**Order #P-401**)
- In this case, this provision did not apply to the disclosure of the identity of the author of certain letters written to an institution regarding the requester. The requester said that if the identity was of a certain individual, steps could be taken to enforce a peace bond. The Commission stated that this factor did not apply because there was some doubt as to whether legal action could be taken in the circumstances and no current legal action had been commenced. (**Order #P-515**)
- Records relevant to an Ontario Human Rights Commission complaint were not disclosed even though a board of inquiry had been established to hear the complaint. The requester was unable to establish that the records were needed to prepare for the hearing or to ensure that the hearing was impartial. (**Order #P-816**)
- This provision did not apply to the release of records of one deceased individual to the family of two other deceased individuals where all were killed in a motor vehicle accident. This was so even though the Coroner had conducted an investigation and rendered a report. The records at issue were subject to the presumption against disclosure for medical records. (**Order #P-945**)

#### This Provision is Relevant

- The application of this provision resulted in the disclosure of the name of a child who allegedly threw a stone at another child in a schoolyard. The lawyer acting for the parents of the child who was hurt in the incident had a legal right to add the child as a party to the existing civil action, and the child's name is necessary in order to do so. However, ss.(2)(d) does not apply to the address of the child who was allegedly the perpetrator and to the names and addresses of the witnesses. As a result, this latter information was not disclosed. (**Order #M-55**)
- A request was made for an interim order issued by the Criminal Injuries Compensation Board in respect of a claim applied for by the family of a deceased. The access request was made by a defendant in a civil action for damages brought by the family of the



deceased. The Commissioner held that notwithstanding that the amount of the interim order had been disclosed to the requester in mediation, the information in the interim order did have a direct bearing on the civil action and therefore this subsection weighed in favour of disclosure of the interim order to the requester. (**Order #P-919**)

- The Commission ruled that this subsection is relevant to the disclosure of the names of tenants who occupied the unit in which a fire started to the insurers of the building. The insurance company wanted to name the tenants in a civil action commenced by the insurance company to pursue a legal claim against the individuals who were allegedly responsible for the fire. The Commission ordered that the names be disclosed. (**Order #M-592**)

### Internal Employment-Related Matters

#### General

- Where an allegation of sexual harassment or unprofessional conduct is made, records in respect of the investigation should, in the absence of other factors, be disclosed in order for the employee to fairly determine his or her rights. However, if the disclosure of witness statements would expose the witnesses to harm, then the records may not be disclosed. (**Orders #182, 165**)
- Where the complainant in a sexual harassment investigation provides no evidence to establish that the need for the names of the witnesses and the witness statements are referenced to an existing or contemplated appeal under another statute, this provision does not apply. In addition, the complainant would have to show that the record would be relevant in the determination of the legal right and would have to show why the record is required to prepare for the proceeding. (**Order #P-443**)
- This factor may be relevant to a consideration of the disclosure of records to an alleged harasser that were created during an investigation into a complaint of workplace harassment. It would apply, for example, where the employee has grievance rights in respect of the same matter that was at issue in the complaint. This factor does not apply to other non-legal rights, such as the right to a fair job evaluation. (**Order #M-82**)
- Where the complainant in a workplace sexual harassment investigation provides no evidence to establish that the need for the names of the witnesses and the witness statements are referenced to an existing or contemplated appeal under another statute, this provision does not apply. In addition, the complainant would have to show that the record would be relevant in the determination of the legal right and that the record is required to prepare for the proceeding. (**Order #P-443**)

#### This Provision is Relevant

- Where an individual has been formally disciplined as a result of the findings of an internal



workplace harassment investigation, and the individual is grieving the discipline and needs the records in order to conduct the grievance, this factor may be a relevant consideration. **(Order #M-212)**

This Provision is Not Relevant

- This provision did not apply to the disclosure of co-workers' statements in respect of a series of employment-related incidents. While the co-workers had provided information about another employee (the appellant), who was subsequently disciplined, it was evident that the appellant was not pursuing the matter formally. **(Order #P-283)**
- This factor may be relevant to a consideration of the disclosure of records created during an investigation into a complaint of harassment where an employee has grievance rights in respect of the same matter that was at issue in the complaint. This factor does not apply to other rights, which are not legal rights, such as the right to a fair job evaluation. **(Order #M-82)**
- In this case, the Commission ruled that this provision did not apply to disclosure of witness statements and identities to an alleged harasser in respect of an internal workplace harassment and discrimination investigation. Even though the investigation culminated in disciplinary action, which he is now disputing under the Public Service Act, the Commission found that the witness information was not needed because access to the investigation report was disclosed to him. The report detailed and analyzed all the evidence relevant to the complaint and summarized the witness statements. **(Order #P-541)**
- Where an employee of an institution had not established that access to records created during his promotion deliberations were related to an existing or contemplated proceeding and were relevant to and required in the proceeding, this provision was not applicable. **(Order #P-434)**
- This section did not apply to disclosure of the scores of a successful candidate to a third party in a job competition. The requester's submission that his rights were affected by the "unfair" selection process was not sufficient to result in disclosure of the successful candidate's personal information to a third party. **(Order #M-135)**
- This factor did not apply when, as a result of a finding that the employee had harassed another person in the context of an internal workplace harassment investigation, a 'letter of counsel' was placed in the employee's personnel file. The employee had already taken the matter to the Grievance Settlement Board and that proceeding had been resolved. There was no further proceedings that the employee could take. **(Order #P-651)**



General

- This factor only weighs in favour of privacy protection. (**Orders #M-256, P-665**)
- The applicability of this clause is not dependent on whether the damage or harm envisioned is present or foreseeable, but whether the damage or harm would be unfair to the individual involved. (**Orders #P-256, P-710**)
- The release of a list of the identities of individual lottery winners could expose the individuals to pecuniary or other harm. It constitutes an unjustified invasion of personal privacy. This is so despite the fact that there is a requirement for a one-time disclosure (by publication) by the Lottery Corporation. (**Orders #180, 181**)
- This factor did not apply to the disclosure of the names and addresses of petitioners who signed a petition calling for a formal inquiry to investigate the affairs of a Township. The Commission found that there was not sufficient evidence to establish that retaliation would take place as a result of the petition. (**Order #P-516**)
- The disclosure of names of individuals who were detained in a detention facility prior to trial may reasonably be expected to unfairly expose an individual to harm and mitigates against disclosure. (**Orders #P-657, P-746**)
- This factor weighs in favour of non-disclosure of information provided by inmates in a report about an incident that occurred in a correctional facility. The Commission held that inmates in these circumstances were vulnerable in respect of comments they may make about correctional staff. (**Orders #P-686, P-597**)
- An out-of-court settlement reached between a former employee and an institution was not subject to this provision simply because it contained a confidentiality clause which applied to the former employee. If disclosure was ordered by the Commission it would be the institution that would release the records and not the former employee. Consequently the employee would not be exposed to harm. (**Order #M-441**)

Internal Employment-Related Matters

- In an internal investigation for workplace discrimination and harassment, the complainant did not provide sufficient evidence to establish a direct connection between disclosure of the record and the harm described in this provision. In this case, the complainant stated, in submissions and not by affidavit, that disclosure should not be made because of a fear of retaliation. The Commission therefore found that the factor was not a relevant consideration in respect of disclosure of the record. (**Orders #P-446, P-447**)
- This factor was held to result in the non-disclosure to the alleged wrongdoer, the



'employee', of internally prepared occurrence reports which were the foundation of the employee's termination. While the employee subsequently regained her job, the Commission agreed with the institution that to disclose the information would unfairly expose the individuals who prepared the reports in the course of their employment to harm. (**Order #P-665**)

- The fact that disclosure of a record created during an internal workplace discrimination and harassment investigation could set off a new round of harassment does not provide a substantial basis for the application of this factor. (**Order #P-694**)
- In this instance the argument that disclosure of a record created during an internal workplace harassment investigation could set off a new round of harassment was accepted. (**Order #P-959**)

ss.(2)(e), (f) and (h)

#### General

- Addresses of employees of a maximum-security psychiatric hospital are highly sensitive and must be kept confidential to protect their personal security. As a result, this information was not released. (**Order #P-332**)
- This factor weighs in favour of non-disclosure to the requester, a former Corrections Officer, of a letter written by an inmate containing personal information of two inmates regarding allegations of an improper relationship between the requester and an inmate. (**Order #P-915**)

#### Internal Employment-Related Matters

- The alleged harasser in an internal workplace investigation did not obtain a copy of the final investigation report based on these factors. While, in general, the parties to an harassment investigation ought to be advised of the substance of the allegation and the identity of the complainant, the circumstances of each case have to be considered to determine whether the disclosure would unjustifiably invade the privacy of other individuals. In this case, the Commission found that these factors weighed in favour of non-disclosure. (**Order #P-651**)
- Although a complaint letter was read to the appellant, the Commission found that this did not constitute "disclosure" for the purposes of the Act (**Order #P-937**)



General

- In order for information to be "highly sensitive," the institution must establish that release of the information would cause excessive personal distress to persons other than the appellant. (**Orders #P-434, P-469, M-167, M-173, P-547, P-606, M-256, P-634, P-663, M-295, M-296, P-658, P-669, P-673, P-685, M-327, P-712, P-732, P-746**)
- The fact that an individual may be embarrassed by a disclosure of personal information is not sufficient to make this factor a relevant consideration. (**Order #P-434**)
- The existence of a record of criminal convictions is "highly sensitive" and, as a result, this provision is relevant in a consideration as to whether an institution may refuse to confirm or deny the existence of the record. Even where the criminal record is disclosed publicly during a trial or during a sentencing hearing, it should not be freely and routinely available to anyone who asks. Because it would be an unjustified invasion of the offender's privacy to disclose the record of criminal convictions, the institution may refuse to confirm or deny the existence of the record. (**Order #M-68**)
- An audit report regarding records of expenses claimed for relocation are not highly sensitive. These expenses are submitted routinely for verification and approval. (**Order P-433**)
- Disclosure of institutional and health records compiled by a correctional facility concerning an occurrence at a detention centre were 'highly sensitive' insofar as they contained names of inmates who are awaiting trial. The confirmation that an individual was detained at the correctional facility prior to trial could cause the individual extreme personal distress. (**Orders #P-597, P-657, P-686, P-732**)
- Disclosure of the names of individuals who review drug products as consultants to government would result in an unjustified invasion of the named individuals' privacy, based on the application of this provision. The institution must preserve the integrity of the drug review process and prevent the individuals from being harassed and lobbied by drug manufacturers. (**Orders #P-669, P-235, P-284, P-291**)
- Records which disclosed that a named deceased individual was convicted of certain offences contained sensitive information. The Commission ordered that the excerpts from the records which describe the offence, not be disclosed to the daughter of the deceased. (**Order #P-679**)



- The fact that a note to file, which contained highly sensitive personal information about several people was read out at a meeting of the Health Disciplines Board does not negate the sensitivity of the information in the note when a request is made for the record. Access to the requester was denied because it would be an unjustified invasion of privacy of others. **(Order #P-895)**

#### Internal Employment-Related Matters

- In this case, the Commission ruled that the affected party would be subject to excessive personal distress where the record in question dealt with a discipline matter, which the institution assured the affected party was removed from his or her personnel file. As a result, the affected person would not have expected that management of the institution would have access to the record. **(Order #P-606)**
- The Commission ruled that this provision applied to the disclosure of a copy of a report produced as a result of an internal investigation into a workplace-related incident, in which the requester threatened harm to her co-workers. The Commission found that the report contained "highly sensitive" information concerning the workplace environment and dealt with difficult interpersonal problems experienced by the parties. While the requester was disciplined for the threatening behaviour, the report dealt with the events leading up to the behaviour and not to the threats. **(Order #P-712)**
- This provision is relevant to the determination of whether disclosure of personal information contained in records that describe a series of employment-related complaints about the conduct of the appellant should be released. **(Order #P-312)**
- Information provided by co-workers about another employee (the appellant), in relation to a series of employment-related incidents, was sensitive information and therefore not released to the appellant. **(Orders #P-283, P-297)**
- Certain parts of an investigation report into the operation of a police force were exempt in this instance because of this provision. **(Order #P-391)**
- An internal investigation into a morale problem at an Ontario Provincial Police detachment was "necessarily highly sensitive, touching as it does on questions of competence, safety, relations between officers and within the community generally." [at p. 4] As a result, the individual who was investigated did not obtain a number of records related to the investigation. The Commission also noted that "...it is essential that such candid disclosure be protected and encouraged in investigations of this type." [at p.4] The individual who was investigated had obtained access to the comments that had been made about him during the course of the investigation. **(Order #P-663)**



- This provision applied to deny disclosure to an Audit Report dealing with the performance of an individual employee of an institution. The Commission found that the information contained in the report, which dealt with conflict of interest, was highly sensitive. (**Orders #P-757, P-758**)
- The disclosure of an institution's internal audit branch report entitled "Special Investigation on Conflict of Interest Allegations" was held to be exempt, in its entirety, under this provision. This was so even though the requester had originated the complaint and had provided information to the investigators during their inquiry. (**Orders #P-813, P-814**)
- The Commission found that the disclosure of a memo concerning an incident that involved the requester conduct in the workplace was governed by this provision. Given that it was determined that the personal information about the affected parties was highly sensitive it was not disclosed. (**Order #P-836**)

#### Internal Workplace Discrimination and Harassment Investigations

- This factor is relevant to a consideration of the disclosure of certain records deriving from an investigation into a complaint involving workplace harassment. The Commission ruled that information which pertains to normal, everyday working relationships and workplace conduct is not highly sensitive. It also stated that when an allegation of harassment is made and investigated, it is reasonable for the parties involved to find such information distressing in nature. The Commission stated that, "Nevertheless...it is not possible for such an investigation to proceed if the complaint is not made known to the respondent." (at 5, **#P-446**) This factor is only a relevant consideration weighing in favour of non-disclosure to the alleged harasser of information that is not directly related to the complaint and that is provided by individuals other than the complainant. This factor is not relevant and therefore weighs in favour of disclosure to the alleged harasser of information from the complainant and others that is directly related to the complaint. Once the investigation is completed, it is essential that the parties be advised of how the complaint was resolved and why (**#P-694**). (**Orders #M-82, P-446, P-447, P-524, P-527, M-212, P-612, P-614, P-615, P-651, P-656, P-671, P-685, P-694, P-706, P-738**)
- This factor is relevant to a consideration of the disclosure of certain records deriving from an investigation into a complaint involving workplace harassment. The factor is relevant in respect of the information provided by individuals other than the complainant, and not in respect of the information provided by the affected persons in direct response to the complainant's complaint. (**Orders #M-82, P-447, P-651**)
- This factor is not relevant regarding information provided by the parties to a workplace discrimination and harassment complaint and information provided by officials investigating the appeal. This factor is relevant to information provided by other individuals during the course of the investigation. (**Order #M-212**)



- This factor did not apply to information derived from a police investigation into an allegation of criminal conduct resulting from an internal workplace matter. The Commission employed the same reasoning as they have in respect of internal workplace harassment matters, and, as a result, it was determined that this factor is not a relevant consideration when the requester is one of the parties directly involved and the personal information relates to the identity of the complainants and the substance of a workplace-related complaint. (**Order #P-612**)
- This provision was held to not be relevant to the disclosure of certain records related to an internal investigation by an institution for sexual harassment. The Commission noted that this provision was not a relevant consideration when the requester is one of the parties directly involved (i.e., the complainant or the respondent) and the personal information relates to the identity of the complainant, the substance of the complaint, the respondent's response to the complaint, the status or outcome of the investigation and other similar information that is essential to the proper and fair investigation\resolution of the complaint. (**Order #P-552**)
- The application of this provision resulted in the non-disclosure to an alleged harasser of certain witness statements and witness names regarding an internal investigation into workplace discrimination and harassment. The Commission found that the information was highly sensitive. In determining this matter, the Commission noted that the alleged harasser had received a copy of the complaint, some internal memos regarding the complainant's concerns and the investigation report. (**Order #P-541**)
- In this case, a formal internal workplace complaint was not made and the affected person was not found to have acted inappropriately. As a result of an informal discussion with an advisor, a letter was sent in the matter. In the result, the factors in ss.(2)(f) and (i) militated against disclosure to the individual referred to in the letter, because to do so would unjustifiably invade the privacy of the affected party. (**Order #P-602**)

ss.(2)(f) and (h)

#### General

- The application of these provisions resulted in the non-disclosure of the names of individuals who had reviewed a drug product for the institution during the course of their appointment by Order-in-Council. The Commissioner was satisfied that these individuals provided their services on a confidential basis and that their identity was sensitive information. (**Orders #P-235, P-284, P-291**)
- The disclosure of the identity of a complainant as well as the identities of those who provided testimony during a private hearing would contravene this section, given the sensitivity of the information and the fact that it was provided in confidence. (**Order #P-239**)



- The disclosure of a record prepared after an investigation of an employee in respect of the submission of expense claims was not supplied in confidence, nor was it highly sensitive. **(Order #P-256)**
- In this case, these factors weighed against disclosure to an employee of certain of his own personal information concerning his employment, promotion, performance or transfer. The Commission found that the information supplied by third parties was provided in confidence and was of a sensitive nature. **(Order #M-251)**
- Information concerning residents of a women's shelter is sensitive under this provision and was not disclosed. The Commission accepted the fact that domestic conflicts are volatile and the agreements entered into between the women's shelters and the institution supported the need for the confidentiality of the information to ensure the safety of the residents. **(Order #P-642)**
- An allegation of child abuse is quite different from harassment alleged between two adults when assessing the weight of these factors. In this case, the nature of the allegation, the fact that the respondent was functioning in a position of trust, the age of the complainant and the fact that the respondent was aware of the identity of the complainant, the nature of the complaint and the results of the investigation all combined to favour non disclosure. **(Order #P-926)**
- Investigation records into the disappearance of a Crown ward which disclosed the Crown ward's case history and relationships with other individuals was highly sensitive and fell within this factor favouring non-disclosure. **(Order #P-991)**

#### Internal Workplace Discrimination and Harassment Investigations

- Where disclosure to one of the parties to an internal workplace harassment investigation is being considered, the former view of the Commission as to the significance of disclosure to ensure fairness in the process is a 'guideline' only. In this case, the alleged harasser did not obtain the final investigative report, with the exception of parts of the appendices and portions of one page which were disclosed on consent of the individual involved. The Commission stated that the circumstances of each case must be considered to determine whether disclosure would be an unjustified invasion of another individual's privacy. The Commission noted that the requester, the alleged harasser, was familiar with the identity of the complainant, the nature of the complaint and the results of the investigation. **(Orders #P-651, P-671)**
- Witnesses who provided information to management in respect of an investigation of an internal workplace incident were aware at the time that the information would be shared with the requester, the person being investigated. They were also aware that the information could be used to the appellant's detriment in a discipline proceeding. Records containing the identities of the witnesses and the substance of their statements had already been disclosed to the requester and disciplinary proceedings had already been completed.



As a result, the Commission did not find that these factors were relevant and the information was disclosed. (**Order #M-257**)

- In this case, statements of witnesses and interview notes regarding an internal workplace harassment investigation were disclosed to the complainant, with minimal severances that dealt with information not directly related to the complaint. The Commission adopted earlier Orders that indicated that the information was not sensitive or confidential in respect of disclosure to the parties to the investigation. However, in this Order, no reference was made to whether the complainant had received the report or other information previously. (**Order #P-656**)
- In this case, the alleged harasser received from the institution the complaint, the investigation report, correspondence from her union, an internal memorandum and a copy of all the notes made during her interviews. Consequently, the Commission held that disclosure of the remainder of the records was unnecessary and that the application of the factors weighed in favour of privacy protection. (**Order #P-692**)
- The Commission found that certain information related to a request by a complainant for records created as a result of the ensuing internal workplace harassment investigation, including reports, findings and notes were accessible. The Commission held that information related to the allegation ought to be disclosed to the complainant. It also noted that where the investigation is completed, it is essential that the parties be advised of how the complaint was resolved and why. The names of witnesses and other information which could identify them (except information relating to the substance of the complaint and the findings) were not disclosed since it was determined that this information is highly sensitive and provided in confidence. (**Order #M-423**)

**ss.(2)(g)**

- Where there is sufficient reason to question the accuracy or reliability of the records, it may be an unjustified invasion of personal privacy to release it. (**Order #151**)
- For this factor to be relevant, it must be shown in specific ways that the information received is inaccurate or unreliable. (**Order #P-663**)
- This factor weighs against disclosure of personal information. (**Orders #P-358, P-622, P-657**)

**ss.(2)(h)**

General

- In order for this factor to apply, the information must be 'supplied' to the institution. In this case, the information in the record was the result of negotiations and was therefore not supplied to the institution. (**Orders #M-278, M-173, M-419**)



- This factor applied to a retirement agreement even though it was negotiated and not "supplied" to the institution. In this case, the employee who negotiated the retirement agreement did expect that it would not be released to the public and the Commission considered this as a factor weighing against disclosure. (**Orders #M-173, M-278, M-419**)
- Confidentiality provisions that pre-date the Act may establish an expectation of confidentiality even though such confidentiality provisions do not prevail over a right of access under the Act. (**Order #P-309**)
- While school boards may be contractually bound to obtain the consent of the insurer before disclosing an incident form compiled as a result of an accident, it does not follow that the information was supplied in confidence. This factor is therefore not relevant. (**Order #M-55**)
- When a lawyer retained by an individual sends correspondence to an institution about his or her client's position, it is reasonable to assume that the personal information about the client is supplied implicitly in confidence. (**Order #M-57**)
- Where notes were kept by an employee for the purpose of turning them over to the ministry's Grievance Arbitration Officer for use in a future grievance hearing, it is not reasonable for the employee to have expected that the information was supplied or received in confidence. As a result, this factor is not applicable. (**Order #P-357**)
- A public servant whose conduct is subject to a hearing under the Public Service Act is entitled to examine witnesses. As a result there can be no expectation of privacy in respect of the will-say statement. (**Order #P-312**)
- In this case, a college successfully applied the "in confidence" factor to the identity of an individual who wrote a letter about a teacher's performance. The college established by affidavit that the letter was provided confidentially only after it was agreed that the identity of the writer would remain confidential. In the result, the teacher, who was the requester, did not obtain access to the identity of the individual who wrote the letter. (**Order #P-375**)
- Complaint information sent by concerned citizens regarding an alleged trespass to property was expected to be kept confidential and, as a result, this provision was a relevant factor. (**Order #P-401**)
- Individuals provide home child-care services for an institution on an implicit understanding of confidentiality regarding the provider's home address. As a result, this provision weighs in favour of non-disclosure of this information. (**Order #M-109**)
- This provision is relevant in respect of records created by staff in determining whether an employee should be promoted or be hired in a new position. In this case, staff and



individuals who discussed the matter would reasonably assume that these discussions would be confidential. (**Order #P-434**)

- Factual information provided by an employee in support of relocation expenses was not provided in confidence. (**Order #P-433**)
- Where correspondence is received by an institution in anonymous form, the record itself is not supplied in confidence by the author. The nature of an anonymous communication indicates that the supplier of it does not wish his or her identity known. (**Order #P-469**)
- Information obtained by the police during a law enforcement investigation is not necessarily obtained in confidence. The Commission would have to review the circumstances and the records to determine whether the information was provided in confidence. (**Order #M-167**)
- This factor was not relevant to the disclosure of the names and addresses of petitioners who signed a petition to cause a formal inquiry into the affairs of a Township. The petitioners stated that they signed the petition in the privacy of their homes on the understanding that their identities would only be disclosed to the institution. Under s.178 of the Municipal Act, petitions signed by over 50 electors may cause the inquiry to take place. A Township could request an inquiry to verify formally that sufficient signatures were obtained and could disclose the identities in the course of the inquiry. (**Order #P-516**)
- This factor applied regarding the disclosure of the names of the reviewers of films for the Ontario Film Development Corporation. In correspondence sent to reviewers, the corporation stipulates that the evaluation is done in confidence and that the identity of the reviewer is to be kept confidential. As a result, the information was not disclosed. (**Order #P-611**)
- A letter addressed "solely to the Board of Education" did not, according to the Commission, signify that the document was intended to be kept confidential. The wording of the letter suggested that if there were further occurrences which required investigation, then the letter would be considered as part of the investigation. (**Order #M-256**)
- Minutes of Settlement were entered into with an expectation of confidentiality that was reasonable in circumstances where the parties demanded confidentiality and the institution provided assurances that this would be done. (**Order #P-621**)
- This factor militated against disclosure of sensitive personal information provided by a child in respect of a custody dispute. In order for the institution's child advocacy office to fulfil its role, information needed to be supplied in confidence. (**Order #P-673**)



### Internal Employment-Related Matters

- In this case involving an internal investigation of an institution's employee regarding alleged falsification of expense claims, the Commission noted that the institution investigator did not give an unqualified assurance that the statements provided to him by staff witnesses would be held in confidence. As a result, the Commission found that there could be no reasonable expectation of confidentiality. (**Order #P-634**)
- This factor applied in respect of information gathered as part of an internal investigation into the handling of an incident in a correctional facility. The institution told inmates, who were asked for information, that it would be kept as "confidential as circumstances permit." The Commission found that the statements provided were in confidence, but that the occurrence reports which were required to be filled out by staff as part of their routine employment, were not. (**Order #P-686**)
- This provision is relevant in respect of records created by staff in determining whether an employee should be promoted or be hired in a new position. In this case, staff and individuals who discussed the matter would reasonably assume that these discussions would be confidential. (**Order #P-434**)
- The Commission found that individuals who provided information concerning an internal workplace matter involving the requester did so with an expectation of confidentiality. The affected parties were told that the information provided would be treated confidentially and would not be disclosed to the appellant. Thus, this provision applied. (**Order #P-712**)
- Where allegations have been made about the requester which appear to have had an impact on the requester's employment status, it is not reasonable to expect complete confidentiality to the extent of withholding the allegations from the requester. (**Order #M-586**)

### Internal Workplace Discrimination and Harassment Investigations

- This provision, which derived from an investigation into a complaint of workplace harassment, did not apply to the disclosure of certain records to an alleged harasser. This factor weighs in favour of non-disclosure to the harasser only in respect of information that is not directly related to the complaint and that is provided by individuals other than the complainant. This factor, however, does not apply and therefore weighs in favour of disclosure to the harasser of information which is directly related to the complaint. The Commission stated that it is not possible to guarantee complete confidentiality in respect of these investigations. Alleged harassers must be advised of what the accusation is and who made it to enable them to address the validity of the allegation. Complainants must be given enough information to ensure that the allegations are adequately investigated. (**Orders #M-82, P-446, P-447, P-524, P-527, P-550, M-212, P-614, P-615, P-643, M-287, P-663, P-651, P-656, P-706, P-738, M-396, M-428, M-423**)



- Where co-workers provided statements in relation to an internal employment-related investigation into the requester's conduct, this factor was relevant because the co-workers were given assurances of confidentiality. As a result, the records were not disclosed. (Orders #P-283, P-297)
- The Commission noted, regarding access by the parties to an internal workplace harassment investigation, that the current directive in place for the Ontario Public Service explicitly stated that confidentiality was subject to the Freedom of Information and Protection of Privacy Act. The Commission approved of the above ruling, in **Order #M-82**, and indicated that in this case, the investigation was concluded and the allegation substantiated. It was also noted that the disclosure of this information to the alleged harasser would enable him to consider whether to review the decision to terminate him as an employee for the institution. (Orders #P-614, P-615)
- While the Commission accepted that the witnesses believed that the information that they provided during the investigation of an internal workplace harassment matter would be kept in strict confidence, it held that the true intent of what was told to the witnesses could not support that interpretation. Witnesses were told that "all information must remain confidential, subject to the Freedom of Information and Protection of Privacy Act and the requirement to disclose as required by law..." (Order #P-706)
- Where an internal workplace matter was investigated by the police, the records deriving from the investigation were not subject to this provision. The Commission noted that there was insufficient evidence that the information was provided in confidence. (Order #P-612)
- Confidentiality of personal information compiled during the process of receiving and investigating complaints of sexual harassment should be maintained in order to protect the personal privacy of all individuals involved in the process, and to encourage full and frank communication between them and the institution. While the need to conduct a fair and thorough investigation of the complaint demands the disclosure of a substantial amount of information to the parties directly involved (the complainant and the respondent), the parties are not entitled to know every bit of information communicated to the institution by each other. As a result, the Commission found that this factor was not relevant to disclosure of the identity of the complainant, the substance of the complaint and the status or outcome of the investigation\resolution of the complaint to the alleged harasser. Other information communicated by the complainant was subject to this provision. (Order #P-552)



- The names and personal information of witnesses who were interviewed regarding an internal workplace allegation of sexual harassment were not disclosed to the alleged harasser based on consideration of this factor. This identifying information was severed from the statements and the remainder of the statements were disclosed to the alleged harasser. In this case, the Commission ruled that the alleged harasser had received sufficient information to enable him to ascertain what he is accused of and by whom. **(Order #P-550)**
- This factor weighed in favour of non-disclosure to the complainant of information related to an internal workplace harassment investigation. Individuals who were interviewed during a sexual harassment investigation were assured confidentiality. As a result, the names of the witnesses and their statements were not disclosed. In this instance, disclosure to the complainant of the discussion, findings and recommendations, parts of the report was sufficient to enable the complainant to assess whether the allegations were adequately investigated. **(Orders #P-443, P-643)**
- The application of this factor resulted in non-disclosure to the alleged harasser of portions of a report prepared after an investigation of an internal workplace harassment matter. The alleged harasser was given access to information revealing the identity of the complainant, the substance of the complaint, and the status or outcome of the investigation and other similar information which is essential to the proper and fair investigation/resolution of the complaint. The alleged harasser was denied access to information of the witnesses, including the identities and all other personal information of the witnesses. **(Orders #P-694, M-396, M-423)**
- In this case, the witness statements taken by the workplace discrimination and harassment investigator were supplied in confidence by the parties to the complaint as contemplated by this section. The Commission found that at the time the statements were made, there was a reasonably held expectation of confidentiality on the part of the people who made the statements. The Commission noted that this section is only relevant in respect to information provided by individuals other than the appellant and not in respect of information provided by the affected persons in direct response to the complaint. The Commission held that the witness statements need not be disclosed in their entirety because the appellant had received the interim and final investigation reports in which each of the witness statements were outlined in great detail. **(Order #P-962)**

ss.(2)(i)

#### General

- While the release of a report about an employee's submission of expense claims may affect the reputation of the individual, any such damage would not be "unfair." It is fair that institutions establish procedures for expense claims, and that employees follow them. "In submitting expense claims for reimbursement, government employees should do so on the basis that they may be called upon to substantiate each and every expenditure, both



internally to the management staff of the institution and externally to the general public." Nevertheless, the names of the individuals referred to in the record (except the individual consenting to release) were severed with the rest of the report released. (**Order #P-256 with Quotation at page 13, P-433, M-167, P-547, P-634, P-710, P-712, M-347**)

- The release of an internal investigation report that scrutinizes an employee's expense claims, based on an allegation of wrongdoing, and that exonerates the employee would not contravene this provision. The Commission noted that it ought to be the expectation of employees that their expense claims be carefully scrutinized. (**Order #P-634**)
- Because some of the information in an audit report regarding the submission of expense claims by public officials may potentially damage the reputation of these individuals, the names and positions were severed out of the report. This was done even though individuals knowledgeable about the ministry's departments and audit investigations could identify the individuals. To sever more of the record would be inadequate; the public has a legitimate right to know that relocation expenses, purchasing and operational policies and procedures of the institution are being properly administered. (**Order #P-433**)
- Investigation records regarding a former senior official of an institution which probe the appropriateness of his foreign currency trading activities were held by the Commission to not 'unfairly' damage the reputation of the senior official. (**Order #P-710**)
- The applicability of this provision is not dependent on whether the damage or harm envisioned is present or foreseeable, but whether the damage or harm would be unfair to the individuals involved. The disclosure of an anonymous "poison pen" letter that contained second-hand information of an unsubstantiated nature would result in "unfair" damage or harm to the individuals involved. (**Order #P-469**)
- This factor applied to the disclosure of a record containing the comments of staff regarding the appropriateness of the conduct of a prosecution. While the comments were accurate, they were not meant to be disclosed to the public. As a result, the disclosure of the record would unfairly damage the reputation of the employee involved. (**Order #M-158**)
- This factor weighed in favour of non-disclosure of a letter of complaint made by an individual. The institution claimed that if the named author of the letter did not write it, release of the identity could unfairly damage the individual's reputation. The Commission ruled that sufficient doubt had been cast on this issue to warrant its consideration. (**Order #P-515**)
- A record which states that an individual who had been convicted of an offence and served a prison term and is now deceased, would not engage this factor. The record would not "unfairly" damage the deceased's reputation. (**Order #P-679**)
- Comments in a confidential report which reflect views of staff critical of the performance



of other staff could unfairly damage the reputations of the staff being commented on and therefore the records were not released. (**Order #P-964**)

#### Internal Workplace Discrimination and Harassment Investigations

- In both these cases, the Commission found that this factor was not relevant to a consideration of whether information related to an internal workplace harassment investigation would be disclosed to the complainant and the harasser. (**Orders #P-443, P-446**)
- The application of this provision resulted in the non-disclosure to the alleged harasser of certain witness statements and witness names regarding an internal investigation into workplace discrimination and harassment. The Commission found that disclosure may unfairly damage the reputation of the witnesses. In determining this matter, the Commission noted that the alleged harasser had received a copy of the complaint, some internal memos regarding the complainant's concerns and the investigation report. (**Order #P-541**)
- In this case, a formal internal workplace complaint was not made and the affected person was not found to have acted inappropriately. As a result of an informal discussion with an advisor, a letter was sent in the matter. As a result, the factors in ss.(2)(f) and (i) militated against disclosure to the individual referred to in the letter, because to do so would unjustifiably invade the privacy of the affected party. (**Order #P-602**)
- In this case the Commission found that this factor was relevant to a consideration of whether information related to an internal workplace harassment investigation would be disclosed to the harasser. (**Order #P-959**)

#### **ss.(2) and (3)**

- The disclosure of the scheduled and possible additional increases of salary in an employment contract is not an unjustified invasion of privacy. Specific salary cannot be discerned from these items as long as the salary steps within the salary range are not disclosed. (**Order #M-23**)

#### **ss.(3)**

- Once the presumption has been established pursuant to s.21(3) [FIPPA] \ s.14(3) [MFIPPA], it may only be rebutted by the criteria set out in s.21(4) [FIPPA] \ s.14(4) [MFIPPA] or by the "compelling public interest" override in s.23 [FIPPA] \ s.16 [MFIPPA]. (**Re John Doe et al. and Information and Privacy Commissioner et al. (1993), O.R. (3d) 767 (Div. Ct.), Orders #M-170, M-198, M-202, M-217, P-541, M-215, M-236, M-240, P-568, P-567, P-571, P-597, P-598, P-600, M-232, M-225, P-583, P-585, M-223, P-817**)



ss.(3)(a)

- General references to the psychological condition of individuals made by those who are not qualified to make those observations do not relate to a medical, psychiatric or psychological conditions as contemplated by this provision. (**Order #M-396**)
- Records that disclose observations of the position and state of an individual who is deceased are not subject to this presumption. (**Order #M-50**)
- Post-mortem forensic test results of the blood and urine analyses of blood/alcohol concentration relate to the medical condition of individuals. These records are therefore subject to the presumption in ss.(3)(a). (**Orders #P-362, P-482, P-519**)
- The fact that a child was born on a certain date is not part of the medical history of an individual. (**Order #P-309**)
- Forensic test results showing that alcohol or drugs are in the blood stream relate to a medical condition and are covered by this provision. (**Order #P-412**)
- Post-mortem forensic test results involving blood and urine analyses pertain to the medical condition of a deceased person and fall within this section. As well, a coroner's report that includes blood, urine and tissue sampling, and the coroner's observations about the cause of death contain personal information about the medical condition of the deceased. (**Orders #P-362, P-519, P-568**)
- A witness statement made regarding an internal workplace discrimination and harassment allegation contained information related to an individual's medical condition and subsequent visit to a physician for treatment. As such, the information was subject to this presumption. (**Order #P-541**)
- Notes describing some medical symptoms are not specific enough to be subject to this presumption. (**Order #M-327**)
- The fact that the record containing the medical history of an individual other than the appellant was prepared by the appellant does not entitle the appellant to disclosure of the information. (**Order #P-732**)
- This presumption did not apply to a memo that contained the author's concerns regarding the actions of the requester and their impact on her co-workers. (**Order #P-837**)
- The health card number and version code constitute medical history under this subsection. (**Order #P-867**)



- A description of injuries received by the victim of an assault, which is an observation by a police officer not a medical professional, is not covered by this presumption. (**Order #M-451**)
- The record at issue was a hand written note containing a record of a phone conversation between a doctor's secretary and a friend. This note contained personal information of several people. The Commission endorsed the ministry's position that this provision was applicable because it contained information relating to medical psychiatric or psychological history of a named individual. (**Order #P-895**)
- Records which related to allegations of abuse were found to contain information relating to medical history, condition, treatment and evaluation of an individual. (**Order #P-930**)
- The Commission ruled that information pertaining to a person's death and the condition of his body as described by a medical practitioner is medical information and therefore, personal information. Such records are subject to the presumption in this provision. (**Order # P-945**)

ss.(3)(b) (See as well, cases under s.2(1) definition of "law enforcement," and s.14 [FIPPA] \ s.8 [MFIPPA].)

#### General

- The presumption applies to investigations into possible violations of law; as a result, there is no need for criminal charges to be laid or for proceedings to have been commenced for the presumption to apply. (**Orders #P-223, P-237, M-22, M-289, M-351, M-395, P-613, M-437, M-567, M-584, M-585**)
- Occurrence reports and other reports and records compiled by a police force as a result of an investigation into a possible violation of law fall within this presumption. This would include documentation prepared to obtain a warrant. (**Orders #P-585, M-42, M-48, M-293, M-289, M-300, M-304, M-308, M-312, M-317, P-678, M-351, M-357, P-731, M-363, M-368, M-375, M-379, M-381, M-393, M-389, M-395, P-793, M-413, M-418, M-421, M-553**)
- A disclosure of personal information to prosecute the violation only occurs after a charge is laid. (**Order #M-6**)
- The fact that a charge laid by the police under the Criminal Code was withdrawn does not negate the applicability of this section, namely that there must be an investigation into a possible violation of law in order for the presumption to be upheld. (**Order #M-508**)



### This Presumption Applies

- Investigations conducted under the Ontario Human Rights Code are subject to the presumption in this section. The presumption is not rebutted in respect of handwritten notes of a complaint even though the same notes in typewritten form were disclosed to the requester. Also, an investigator's notes taken during a hearing were not disclosed even though the requester was present at the hearing. (**Orders #P-403, P-363**)
- This provision applies to records generated by an Ontario Provincial Police internal investigation into an allegation that the Police Services Act has been contravened. (**Orders #P-285, P-372, P-626, P-709, M-365, M-587**)
- Records created by a police officer employed by the Public Complaints Investigation Bureau in the course of the investigation of a complaint related to the enforcement of the Police Services Act were covered by this presumption. (**Orders #M-245, M-314, M-365, M-383, P-525**)
- This presumption applied to an internal discipline report about a police officer. The investigation took place under s.59(1) of the Police Services Act, which dealt with a violation of the Code of Conduct. (**Orders #M-348, M-422**)
- This provision applied to a fire inspector's report that an alleged breach of the Provincial Fire Code, which is a regulation made under the Fire Marshals Act. (**Order #M-339**)
- A police officer's notebook containing notes regarding investigations of alleged criminal activity was subject to this presumption. (**Order #M-253**)
- This provision applies to a record generated by an Ontario Provincial Police investigation under the Private Investigators and Security Guards Act. (**Order #P-266**)
- This provision was pivotal in denying access to a convicted murderer of certain records containing third party personal information related to his prosecution. (**Order #P-275**)
- This provision applies to the information contained on a parking tag issued for the purpose of enforcing compliance with municipal by-laws governing street parking. The tag is in fact a summons to the offending registered vehicle owner of the alleged infraction. (**Order #M-336**)
- Access to the name of a complainant regarding an alleged breach of the Day Nurseries Act was subject to this presumption. Similarly, access to the name of a complainant regarding alleged breaches of a zoning by-law was also subject to this presumption. (**Orders #P-640, M-279**)
- The exception contained in the phrase "continue the investigation" refers to the investigation for which the personal information was compiled, i.e. the investigation "into



the possible violation of law." As a result, even where another party is continuing an investigation, this presumption would apply. (**Order #M-249**)

- This provision applied to records compiled by the police during its investigation into the cause of death of a deceased. As a result of the application of the exemption, the records could not be disclosed to the family members. (**Orders #M-243, M-283, M-544**)
- This presumption applies to records containing names and addresses that derived from a police investigation into the cause of a fire, even though the alleged perpetrators were children and could not be charged with the offence. (**Order #M-38**)
- This provision applied to a witness statement taken from a child under 12 as part of a police investigation of a fire. (**Order #M-225**)
- An investigation conducted by the Human Rights Commission is an investigation into a possible violation of law. (**Order #P-363**)
- This provision could apply to the personal information of those being investigated or to those being interviewed in respect of an investigation. An investigation into whether a recipient of family benefits is entitled to the monies received is an "investigation into a possible violation of law." Here, the Family Benefits Act would be contravened if unauthorized benefits were received. (**Order #P-223**)
- This provision applies to records created as a result of an investigation into a violation of the Highway Traffic Act. The presumption was not rebutted here simply because there was a pending lawsuit. (**Order #P-261**)
- This provision applied to an investigation of allegations of unfair business practices, which are violations under the Business Practices Act. (**Order #P-405**)
- A coroner's report was subject to this presumption. When a violent death occurs in circumstances where Criminal Code charges may be laid, the normal practice is for a coroner's examination to take place. The record was compiled as part of an investigation into a possible violation of law. (**Order #P-519**)
- Personal information contained in the records, compiled as part of an investigation into a possible violation of a by-law, is subject to this presumption. Therefore, the name of the complainant would be subject to this presumption. (**Orders #M-181, M-382**)
- Where the results of an internal investigation into the billing practices of the requesters was turned over to the police and where charges were subsequently laid, this presumption applied. The Commission determined that the ordinary meaning of the word "compiled" was to gather or collect rather than to create in the first instance. It was explicitly noted that the Commission was **not following its earlier order in P-612** (below) which held



that in order to 'compile' the records must have been created at first instance. (**Order #P-666**) **Regarding Order P-612, the Commission reconsidered P-612 in Order P-892 and decided to follow P-666 regarding the meaning of compile.**

- Police investigations related to a possible violation of the Dog Owners Liability Act falls under this presumption. (**Order #M-454**)
- This section applied where the records were compiled and were identifiable as part of an investigation into a possible violation of the Criminal Code. This section properly applies to information pertaining to individuals interviewed in the course of an investigation into a possible violation of law. This would include name and address information regarding a witness, and a transcript of a tape recording of a conversation between a witness and a police officer. (**Order #P-928**)
- In this case, the Commission did reconsider an earlier decision in P-612. The Commissioner decided to follow P-666 regarding the meaning of the word "compiled". (**Order #P-892**)
- In this case, the requester asked for information about complaints received by the police concerning harassing phone calls made by a named individual. The police, by simply confirming the existence of any responsive records regarding this investigation into harassing phone calls could reveal personal information about an identifiable individual, particularly the fact that this individual had been the subject of a police investigation. This would be an unjustified invasion of personal privacy. (**Order #M-525**)
- This presumption applied to personal information contained in a police investigation report into a vehicle accident. (**Order #M-527**)
- Although petitions are not usually considered confidential documents, this provision is satisfied when a signed petition concerning the condition of an individual's property was compiled to initiate an investigation regarding the possible breach of a property standard bylaw. The term "compiled" was held to mean to gather or collect. The Commission found that the petition was exempt. (**Order #M-580**)
- The name, address, telephone number and date of birth of the driver of a van, who may have been involved in a fatal car accident, was compiled as part of an investigation into a possible violation of law (the Criminal Code) and thus falls under this presumption. (**Order #M-579**)
- Personal information in investigations under the Employment Standards Act is subject to this presumption. (**Order #P-990**)

#### This Presumption Does Not Apply

- This section does not exempt from disclosure personal information that is compiled prior



to police involvement or the commencement of a law enforcement investigation regardless of the fact that the personal information may eventually become part of an investigation into a possible violation of law. (**Order #P-612--this decision was not followed in #P-666, as noted above.**)

- This presumption does not apply to minutes of settlement compiled in the course of a law enforcement investigation. These records represent the resolution of the law enforcement proceeding and are not part of the investigation into the possible violation of law. The execution of the minutes of settlement reflect the final stage in the adjudication of the proceeding. In this case, the Commission was not satisfied that disclosure would permit the drawing of accurate inferences into the nature of the allegations. (**Order #P-612**)
- This provision does not apply to records that disclose that a particular inmate was released in error by jail officials. The records recount an administrative error made by the institution, not a possible violation of law by the former inmate. (**Order #P-289**)
- Personal information compiled by a ministry as part of an investigation into the operation of a training school are not investigations into possible violations of "law." (**Order #P-352**)
- This provision did not apply to records in the custody of a school board relating to an allegation of criminal wrongdoing. While the board had called the police to investigate the matter, the board's records related more accurately to its need to address internal employment-related matters arising from the allegation of wrongdoing. (**Order #M-206**)
- This provision cannot be utilized in respect of an investigation into an allegation of sexual harassment. Such investigations do not constitute possible violations of law; these investigations deal with employment policies and practices. (**Orders #165, P-256**)
- This provision does not apply to records generated as part of an investigation into whether an employee properly filed expense claims. (**Order #P-256**)
- A prior record of offences that have been laid against an individual, and the decisions or sentences that were made in this regard, is not information which is compiled as part of an investigation. The record containing a guilty plea, conviction or discharge or withdrawal of a charge reflect events that occurred after an investigation has taken place. (**Orders #M-68, M-222**)
- This provision is not satisfied in respect of internal investigations that are not "law enforcement" as defined in the Act. (**Orders #M-46, P-377**)
- A record of prior criminal convictions is not information that is compiled as part of an investigation; rather, it is the result of either a guilty plea or a conviction by a court which are events that take place after any investigation is completed. (**Order #M-68**)



- Where an institution investigates an alleged trespass in its capacity as the owner of the property, and not pursuant to any mandate to enforce the law, and where it does so with the intention of bringing a civil and not criminal action against an individual, this provision cannot apply. (**Order #P-401**)
- This presumption did not apply to records of discussions that took place within the institution regarding the appropriateness of the manner in which by-law prosecutions were conducted. The records do not pertain to the investigation into the violation of law; rather, they relate to internal matters which the institution was experiencing in conducting the prosecutions. Records dealing with the investigation of the by-law violation itself would be covered by this presumption. (**Orders #M-157, M-158, M-327**)
- Where a school board investigated a staff member under the Education Act to determine whether he or she ought to be disciplined, the investigation was not subject to this exemption. An investigation for disciplinary purposes is not a law enforcement investigation. Even though, in this case, the allegations involved criminal matters, the board had not called in the police to do the investigation. (**Order #M-327**)
- This provision does not apply to personal information compiled "in anticipation" of an investigation into a possible violation of law. As a result, where the institution argued that an internal investigation into an allegation of sexual harassment was done in anticipation of a human rights complaint, the Commission disagreed and ruled that the presumption in this provision did not apply. (**Order #P-552**)
- In this case, the police had not indicated what possible violation of law was investigated and, as a result, the Commission found that the presumption in this provision did not apply to the personal information of the individual who was investigated. (**Order #M-199**)
- This presumption did not apply to an investigation under s.22 of the Ministry of Correctional Services Act. It was undertaken for the purpose of gathering information and writing a report about an incident that took place in a correctional facility. (**Order #P-686**)
- This provision did not apply to index cards kept by the police containing the name of an individual investigated or charged with a crime, a date and notation of the incident. Such records were kept as an administrative reference and not as part of an investigation. (**Order #M-426**)
- Names of individuals supplied by the appellant to establish his reputation, or his whereabouts at the time of a crime that the Police were investigating, might be expected to fall under this presumption. However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute, is not a proper implementation of the legislation's intention. Applying the presumption in this case to deny access to information which the appellant provided to the Police is



manifestly absurd. Moreover one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. **(Order #M-444)**

- This presumption is limited to records which are compiled and identifiable as part of an investigation into a possible violation of law. To expand the scope of subsection 21(3)(b) to encompass any information which finds its way into a Crown file once the charges have already been laid would enlarge the scope of the presumption beyond what was intended. Where none of the records were elicited or obtained by the Crown or police, or where none of the records contain information relating to the substance of a specific complaint, the presumption does not apply. **(Order #P-849)**
- Coroner's investigations are not investigations into possible violations of law. The Commission stated that no provision of the Coroners Act supports the position that a coroner is specifically mandated to investigate into possible violations of law. Accordingly, the presumption in this provision did not apply. However, those records that were compiled as part of a police investigation are subject to this exemption. **(Order #P-945)**

#### ss.(3)(c)

- A representative of the region who acted as a party to proceedings before the Social Assistance Review Board was not entitled to access to the records of the proceedings involving two social assistance recipients. This presumption was not rebutted by the compelling public interest override. **(Order #P-648)**
- In this case, the Commission upheld the Ministry of Community and Social Services's ability to refuse to confirm or deny the existence of records relating to a named individual's request for social assistance. The records would generally relate to eligibility for social service or welfare benefits. **(Order #P-672)**

#### ss.(3)(d)

#### The Presumption Applies

- Information dealing with an employee's positions, job responsibilities, career history, performance appraisals or other human resource-related characteristics associated with employment history are included in this provision. Thus, information typically provided in a job competition may be within this provision. Information related to one incident which occurred during an employee's employment is not "employment history." **(Orders #P-256, P-433, M-206, M-257, P-658, P-706, P-727, P-749, P-766)**
- Disclosure of the resume of an individual would as a result of this provision be presumed to be an unjustified invasion of privacy. Prior work experience is a category of information included in resumes. **(Orders #11, 97, 99, M-7, M-232, P-273, P-282, P-655)**



- While this provision applied to disclosure of the resume of an individual appointed to a board, the Commission noted in a postscript to this decision that institutions should disclose a brief biography of appointees to public positions on boards and commissions to the public. Where this is done, appointees should be notified of this practice. (**Order #M-7**)
- Personnel Action Forms, with personnel data, assignment information and job history information relate to employment history and are therefore covered by this presumption. (**Order #M-210**)
- This provision applied in respect of resumes and other personal information provided as a result of a job competition. Even where certain categories of information were severed, the remaining material still contained personal information such that this presumption applied. (**Order #P-328**)
- The disclosure of records relevant to an employee's service record and credits on termination would constitute employment history. (**Order #P-244**)
- The date in a retirement agreement that the individual commenced employment was employment history within this presumption. As well, a record that states the dates that an individual is eligible for early retirement and the number of sick days and annual leave days the individual took are within this presumption. (**Orders #M-173, M-278**)
- A witness statement regarding an internal investigation for workplace discrimination and harassment contained information about an individual's past employment positions held with the institution. As such, this information was subject to the presumption in this provision. (**Order #P-541**)
- Disclosure of the names of supply teachers would reveal the number of days and dates on which these individuals worked at a specific school during specific years. This disclosure would constitute "employment history" according to this provision. Hence, the information may not be disclosed to the union. (**Order #M-292**)
- Seniority dates and the names of the individuals, together with the dates they resigned from employment, are subject to this presumption. (**Order #P-762**)
- The date on which a Police officer commences employment falls under this presumption. (**Order #M-451**)
- The record revealing a board member's monthly attendance falls under the presumption. (**Order #P-863**)



### The Presumption Does Not Apply

- Information concerning employment-related incidents involving the appellant and other individuals cannot be characterized as "employment history" of the other individuals. (**Orders #P-360, M-295, M-296, M-586**)
- Records pertaining to a single work-related incident provided by other employees who were witnesses to the incident are not related to "employment history." The creation of these records were not in the ordinary course of employment of these witnesses and did not include the witnesses' "employment history." (**Order #M-257**)
- The disclosure of the identity of a public servant who has performed a certain task does not constitute a disclosure of employment history. (**Orders #170, P-235, P-755**)
- A record containing the number of hours worked per month by an employee does not relate to employment history. (**Orders #M-35, M-438**)
- The disclosure of a person's name and title does not constitute "employment history." (**Order #P-216**)
- The disclosure of the name of a current employer and the current position of the employee is not employment history. (**Order #P-240**)
- The disclosure of a Hospital Practice Licence of a physician employed by an institution does not disclose employment history because the information disclosed in the licence is required to be made a matter of public record by the College of Physicians and Surgeons. (**Order #P-244**)
- The disclosure of what an individual submitted to an institution as expense claims does not denote employment history. (**Orders #P-256, P-433**)
- A letter of complaint about a student in this case did not contain information relating to educational history. (**Order #P-377**)
- Records that simply identify individuals as being employees of the institution are not covered by this provision. (**Order #P-399**)
- In this case, records resulting from an investigation into an allegation of workplace harassment do not include "employment history." (**Order #M-82**)
- The mere fact that an individual is granted an interview for a position does not constitute that person's "employment history." (**Order #P-485**)
- The fact that an individual reviewed a film at a particular time for the Ontario Film Development Corporation is insufficient to characterize this information as the



"employment history" of the individual. (Order #P-611)

- An unsigned agreement between the Registrar of Real Estate and Business Brokers and the affected party in his personal capacity, which addresses the terms and conditions of his licensing by the registrar does not deal with employment history; rather, it is concerned with the terms and conditions upon which his future employment may be based. (Order #P-670)
- Registration information about apprentice electricians is not covered by this provision. Name, occupation, position and employer, without more, will not attract the application of this presumption. (Order #P-755)
- The fact that a judge was a candidate for judicial appointment does not constitute his employment history under this provision. (Order #P-759)
- Employment-related information contained in an investigation report about an employee was held to be a job description. As well, the Commission found that the references in the report to work performance merely discuss documentation and follow-up and did not contain any information of an evaluative nature. (Order #P-828)
- Periods of absence from employment does not include employment history. (Order #M-451)
- The names, certificate numbers, dates of certification, certification expiry dates of sheet metal workers registered under the Trades Qualification Act, while bearing some relationship to the workers' education and employment, does not fall under this presumption. (Order #P-845)
- This presumption did not apply to an employment contract describing possible future events and their impact on the current position of an employee. (Order #M-526)
- In this case, employment related records dealing with allegations of wrongdoing were held to not be within this provision. (Order #M-586)

ss. (3)(f)

#### This Presumption Applies

- Financial information about a family-run cattle operation is so closely related to the income of the family that it is covered by this provision. (Order #-364)
- It is a presumed invasion of personal privacy to disclose the salaries of named employees. The presumption is not rebutted by ss.(2) or (4) or by the fact that public money is spent on the salaries. (Orders #61, 183, M-5)



- Disclosure of the salary for a specific position for which there is one incumbent would be a presumed invasion of privacy. (**Order #M-5**)
- Disclosure of the number of hours worked by an employee may be an unjustified invasion of privacy where the hourly wage is publicly available. As a result, exact salary can be determined. (**Order #M-35**)
- Information about a water rate abatement, provided to an institution by an individual, contained personal information about the individual's finances, assets and financial activities as contemplated by this provision. (**Order #M-318**)
- This provision applied to minutes of settlement that dealt with an individual's income, assets and liabilities. (**Order #M-352**)
- Records describing the finances of the requester relating to the garnishment of his wages by the Support and Custody Enforcement Program, now the Family Support Plan, of the Ministry of the Attorney General are subject to this presumption. (**Order #P-792**)
- An agreement of purchase and sale of land between a Township and an individual purchasers describes financial activities and thus falls under this provision. (**Order #M-536**)

#### This Presumption Does Not Apply

- This presumption did not apply to the contents of a retirement agreement. While it is true that a number of the clauses confer monetary entitlements on the former employee, these provisions cannot be said to come within this provision. These entitlements are one-time payments, to be conferred immediately or over a defined period of time, that arise directly from the acceptance of the agreement. However, the amount that was paid by one individual to a pension plan did describe financial activities and was within this presumption. (**Orders #M-173, M-204, M-419**)
- A record containing financial information about the financial affairs of a company operated by the affected person does not qualify for exemption under this provision since it does not relate to an "individual's" finances. (**Order #P-670**)
- The amount of bail that has been posted for an offender is not financial information of the sort that is dealt with by this provision. (**Order #P-686**)
- Records related to overtime hours "paid and banked" under the VIP program of a police force would not permit the requester to accurately deduce the incremental income earned by the police officer under the program. As such, the Commission held that this provision did not apply. (**Order #M-438**)
- The presumption did not apply to an interim order of the Criminal Injuries Compensation



Board where the amount of the award had already been disclosed to the requester in mediation. **(Order #P-919)**

- Where the impact of certain events on an individual's salary does not reveal the exact salary, this presumption does not apply. **(Order #M-526)**

ss.(3)(g)

This Presumption Applies

- The actual ranking of a candidate in a job competition fell within this provision. **(Orders #196, M-280)**
- The fact that individuals who told a consultant about the efficiency of an institution were unnamed was personal information and was subject to the presumption in this section. Because there were no factors in ss.(2) that would rebut the presumption, the personal information was not disclosed. **(Order #P-348)**
- Scored typing tests and scored typed letters transcribing shorthand notes of a competition are "personal or personnel evaluations." **(Order #43)**
- Assessments of candidates by an interview panel in a job competition are subject to this exemption. The assessments were made according to measurable standards, established for the scoring of the competition questions. Interview rating sheets and data entry test result sheets are personal evaluations. **(Orders #20, 97, 99, 196, P-230, P-273, M-135, P-447, P-470, P-485, M-232, P-759, M-396)**
- This provision raises a presumption concerning recommendations, evaluations or references about, rather than by, the identified individual in question. **(Orders #171, P-685)**
- This presumption applied to assessments of candidates in a job competition. The assessments were made according to the measurable standards established for the scoring of the competition questions. The record indicating which individuals the institution wished to interview was not subject to this presumption; it was not itself a personal recommendation, rather it derived from the recommendation. **(Order #P-485)**

This Presumption Does Not Apply

- This provision does not apply to records generated by an individual who investigated whether an employee filed expense claims in accordance with established policies and procedures. **(Order #P-256)**
- The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards. As a result, records created during an internal



investigation for workplace harassment are not covered by this provision. The conclusions reached as a result of the investigation are based on whether the policy on personal harassment has been complied with. (**Orders #P-447, P-470, P-658, P-706, M-82, M-396, M-586**)

- An inspection report of a police force was not subject to this presumption because the nature of the report did not contain a personal or personnel component. (**Order #P-391**)
- Film reviewers for the Ontario Film Development Corporation review an author's screenplay rather than his or her personal attributes. As a result, this presumption does not apply to the names of the reviewers. (**Order #P-611**)
- This presumption did not apply to comments in a portion of a record about the performance of an individual because the Commission did not consider the record to be a personnel evaluation. (**Order #M-313**)
- The names of references in and of themselves were not subject to this exemption. The personal information must relate to the contents of the reference or evaluation about the individual. (**Order #M-290**)
- Advice of the Judicial Appointments Advisory Committee to the Attorney General on the selection of judicial candidates does not constitute a personal evaluation because it is not made according to measurable standards. This presumption does not apply to this information. (**Order #P-759**)
- Employment-related information contained in an investigation report about an employee was held to be a job description. As well, the Commission found that the references in the report to work performance merely discuss documentation and follow-up and did not contain any information of an evaluative nature. (**Order #P-828**)

**ss.(3)(h)**

- A witness statement regarding an internal workplace harassment and discrimination investigation contained information about an individual's sexual orientation and religious beliefs. As such, the information was subject to this presumption. (**Order #P-541**)
- A portion of a resume which revealed a job candidate's political associations was subject to this presumption. (**Order #P-924**)
- The Commission found that records in a workplace discrimination and harassment investigation which contained an individual's racial origin fell within this provision. (**Order #P-962**)
- Even though several passages in an investigation report into the disappearance of a deceased Crown ward revealed the individual's racial origin, it was not reasonable to apply



the presumption in circumstances where the racial origin of the individual had been reported in the press on numerous occasions. (**Order #P-991**)

**ss.(4)(a)**

General

- The Commission ruled that this provision applied to information about an identifiable individual and includes and applies to the names of individuals who are or were employed by the institution. (**Orders #M-30, M-210**)
- Disclosure of the names of temporary and part-time employees or of current or past employees of an institution is not an unjustified invasion of privacy as a result of this provision. (**Orders #M-26, M-30**)
- Access to an individual's application for employment and resume cannot be achieved through this provision. (**Order #P-273**)

Salary Ranges

- In a situation where each job position has only one incumbent, disclosure of actual salaries would "describe an individual's income." Subsection (4)(a) does not apply to actual salary figures. (**Orders #61, M-5**)
- Since exact salaries have the benefit of a presumed unjustified invasion of personal privacy, it is unlikely, in most circumstances, that any salary-related information would be available to the public. Where salary ranges do not exist, the head may be ordered to establish a salary range which is narrow enough to provide a member of the public with reasonable information. (**Order #M-18, M-102**)
- Given this provision, the legislature recognized the need for the public to have access to some salary information. As a result, institutions should try to establish salary ranges that are reasonable. If they do not, they may be ordered to do so. (**Orders #M-5, M-18, M-23, M-102**)

Employer \ Employee Relationship (and see cases below under ss.(4)(b))

- An employee relationship is established where the "employer" has the right to direct the "employee" in how the work is to be performed, the conditions and hours of work and the results of the work. Another factor includes whether the work is an essential part of the operation of the employer. (**Order #P-244**)



## Benefits

- Information contained in severance agreements provided to employees who took early retirement were not "benefits" as the word is used in this section. These entitlements did not derive from the original contracts of employment and were negotiated between the parties in exchange for the acceptance by them of early retirement packages. (**Orders #M-173, M-273, M-278, M-378, M-419**)
- The chief administrative officer (CAO) and clerk of a Municipality are, as a result of sections 72, 73 and 207.46(a) of the Municipal Act, "officers" in the employ of the municipality. The salary range within which the CAO/Clerk will be paid (without the specific steps, scheduled and additional salary increases) is the "salary range" for the purpose of this section. "Benefits," given the policies of the legislation, should be given a broad interpretation. Benefits include life, health, hospital, dental and disability insurance as well as sick leave, vacation, leaves of absence, termination allowance, death and pension benefits. (**Orders #M-23, M-378**)
- The Commission held that an account entry reflecting contributions to a particular pension fund by an identifiable employee was benefit information and hence accessible under this provision. The fact that exact salary information may be derived from the pension contributions did not result in the information not being disclosed. (**Order #M-378**)
- This provision does not apply to a severance agreement where the agreement relates to present or former employees and not to independent contractors. The entitlements in the agreements did not derive from the original contracts of employment, nor from periodic changes made to the contracts and, as a result, the entitlements did not constitute benefits as defined in this section. (**Orders #M-173, M-204, M-273, M-278**)
- The dollar value of what is described in the Police Chief's employment contract as a terminal allowance to be paid to the Chief for his accumulated sick leave credits and the cash-in-lieu value of the terms of his employment contract for extended medical and life insurance qualifies as a benefit for the purposes of this section. These were employment entitlements in addition to the base salary. These payments were not earned as a result of his retirement but rather accrued to the chief during his employment pursuant to the terms of his employment contract. (**Order # M-558**)

ss.(4)(b)

## General

- In order to determine whether a contract is an employment contract, the following factors must be considered: 1. the level of control and supervision exercised by the employer with respect to a) how the work is performed, b) where the work is performed, c) the hours of work and d) what is produced; 2. the ownership and provision of the equipment used for the job; 3. the economic dependence of the worker on the employer; 4. whether the



worker is entitled to undertake alternative work while engaged by the employer; 5. whether the worker is obliged to follow the employer's organizational policies; 6. whether the worker bears any risk of loss by entering into the agreement; 7. whether the work which the individual performs is a necessary and integral component of the employer's operations. In this case, the Commission found that the salary of the former Chief of Police was in fact a contract for personal services. Although the contract had features that may be part of an employment relationship, it was held to be a contract of personal services based on the following: 1. the contract specifies that the purpose of the agreement was to provide for the orderly transition of the former chief from employment to retirement; 2. the former chief is described in the agreement as a provider of consulting services; 3. the agreement stipulates that the former chief shall withdraw from the workplace and provide services on an 'as needed' basis. There was no contractual requirement that he work a minimum number of hours or on specific days during the week; 4. although requested to do so, the board was unable to provide the Commissioner's office with any information about the former chief's specific responsibilities during this 18-month period; 5. on the date that the former chief was required to withdraw from the workplace, the board appointed a new Chief of Police. Thus, the fact that the former chief was paid a salary under the contract from which income tax, Canada Pension Plan and unemployment insurance deductions were made, that he was allowed to retain some police equipment for his consulting work and his economic dependence on the board were not sufficient to result in the contract being one of employment as opposed to personal services. (**Order #M-373, M-498**)

#### Employment Contract

- The contract that a municipality entered into with a chief administrative officer is an employment contract and not a contract for services. The hiring authority and the nature of the terms and conditions of the contract indicated that an employment contract was contemplated. (**Order #M-23**)

#### Contract for Personal Services

- The Commission ruled that, in this case, a contract with a consultant was a contract for personal services under this provision. As a result, the personal information that may be released is not limited to the financial terms of the agreement but includes all other relevant particulars of the contract. It was noted that this would include the scope of the assignment and the nature of the working relationship between the parties. (**Order #M-277**)
- An Assistant who reported directly to a Town Councillor on work directly related to constituency matters, was not considered to be an employee but rather to have a contract for personal services with the Town. As a result, a description of the services provided, the total number of hours worked and the total amount of the fee charged was released. (**Order #M-498**)



ss.(5) (See as well, cases under s.14(3) [FIPPA] \ s.8(3) [MFIPPA].)

- The Commission ruled that it was not satisfied that the use of this provision offended the Charter of Rights and Freedoms. The Commission noted that it did have the jurisdiction to determine Charter issues. (**Orders #106, P-254, M-198**)
- In order to use this provision, an institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy. Where sufficient evidence is not provided, ss. (5) cannot apply. (**Orders #P-339, M-68, P-423, P-672, M-328, M-432, M-525**)
- The Commissioner will review the manner in which the institution exercises its discretion to refuse to confirm or deny the existence of a record. Where this discretion is exercised in accordance with established legal principles, it will not be interfered with. (**Order #213**)
- In any case, where the institution has the authority to refuse to confirm or deny the existence of a record, the Commission will release the order to the institution before it releases it to the appellant in order to provide the institution with an opportunity to review the decision and determine whether to apply for judicial review. (**Order #P-423**)
- In this case, the Commission ordered the institution to confirm or deny the existence of the records in question because it had not provided any representations in support of the refusal to confirm or deny. The Commission noted that a requester who is denied the right to know whether a record exists or not is in a very different position than a requester who is denied access to a record. The Commission ruled that the discretion that the institution has in this regard should be exercised in rare cases only. Where there is a discretionary exemption, in the absence of representations in support of the exemption, the application of the exemption will not be upheld. (**Order #M-150**)
- An institution relying on this provision must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption. The institution must establish that disclosure of the mere existence or non-existence of such a record would communicate to the requester information that would fall under the exemption. In this case, the Commission found that the investigation and the nature of the allegations were public knowledge and that the exemption would not apply to the disclosure of the mere existence of the records. (**Orders #P-542, P-543**)
- In this case, an individual requested access to his or her own personnel file and any records related to a particular incident. By merely confirming that records related to this incident exist, without indicating the nature of these records or the parties involved, the institution was not confirming that any identifiable individual was involved in the incident. (**Order #M-328**)



- This provision did not apply to records that may exist regarding information gathered by the police about individuals who demonstrate. The police would not be indicating the nature of the records or the individuals involved by confirming that the records exist or not. (**Order #M-432**)
- Simply confirming that records associated with an investigation of a bookstore exist, does not confirm that an identifiable individual was investigated. The exemption therefore does not apply. (**Order #M-453**)
- In this case, the Commission held that simply confirming the existence of records related to the hiring of an individual would not compromise the ministry or the individual. (**Order #P-984**)



A head may refuse to disclose a record where (FIPPA)/if (MFIPPA),

- (a) the record or the information contained in the record has been published or is currently available to the public;  
or
- (b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.







## General

- Given that this is a discretionary exemption, the head has the discretion to decide to disclose a record even where it has been published, or where it will be made available to the public, or to claim the exemption. (**Orders #42, 204**)
- This provision does not apply to exempt records which may be made available at some unascertained date through an alternate access mechanism; in this case, through discovery procedures in a lawsuit. (**Order #M-467**)

## ss.(a)

- Section 22(a) [FIPPA] \ section 15(a) [MFIPPA] is unique among the exemptions contained in this part of the Act. The other exemptions permit an institution to deny access to the requested records because of content or potential harm that might reasonably be expected to result from the disclosure. No harm is listed in this exemption. As a result, the Commission ruled that the purposes of the Act are key to the interpretation of this exemption. The Commission stated that this section should not be applied to indirectly prevent or limit the public's access to information. The Commission held that the government cannot enter into a business arrangement with a private company to provide access where to do so would have the very real potential of inhibiting the public's right of access. Basing an individual's right to access on his or her ability to meet conditions for access determined by a private sector vendor may result in inequitable access to information held by government. According to this decision, where an institution has provided its information to a private sector vendor, the exemption will not apply if the vendor does not provide a "regularized system of access available to members of the public generally." In a postscript, the Commission noted that the search for sources of non-tax revenue must be balanced by the rights of the public to access information for which it has already paid. This balancing will determine whether universal access to government information will be the norm or whether an information elite will be created and only those who can afford to pay will have access to government-held information. The Commission stated that this latter situation would be "unacceptable in an open and democratic society." (**Order #P-496**)
- A willingness to provide records to the appellant is not the equivalent of making the records available to the public under this section. In order for this exemption to apply, the records must be published or available to members of the public generally through a regularized system of access, for example, a public library or a government publications centre. This exemption was intended to provide government organizations with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the Act. (**Orders #P-327, P-496, M-315, M-369, M-383**)



- In this case, the Commission found that the balance of convenience favoured the use of the exemption where an individual wished access to publicly available transcripts of court proceedings. (**Order #M-383**)
- The term "published" means to make known to the people in general. A purposive approach to this provision requires that the word "public" be given an expansive definition. In this case, the advertising brochures from private sector companies were available to the sector of the public engaged in the entertainment business and not to the general public. The record must be available to more than just one sector of the public to satisfy this exemption. These companies were not public bodies that had a mandate to provide their advertising copy to the public, nor was it something that they were in the business of selling to the public. The brochures at issue in this appeal contained advertising for scoreboard equipment, which would only be of interest to a very small percentage of the public who would be in a position to purchase such equipment. (**Order #204**)
- Where the head exercises his or her discretion to not disclose documents that are otherwise available to the public, the head must consider the convenience of the requester compared to the institution. Here, the head improperly exercised his or her discretion when the head failed to consider this "balance of convenience" test. The request concerned small parts of larger publicly available documents. To ask the requester to go and find the part of Hansard or of a tribunal decision would require the requester to go on a fishing expedition to find the material the institution thought was relevant to the request. In this case, the Commission ruled that the balance of convenience favoured the requester and disallowed the application of this exemption. (**Orders #170, at pages 107-110, P-729**)
- When a head relies on this exemption, he or she has a duty to provide the requester with a description of the records or information in question and their specific location (**Orders 191, 204, 123, 124, 191, 204, P-327, P-454, P-463, M-314, M-315, M-383, P-775**)
- Where the head relies on this provision but fails to inform the requester of sufficient information, which would enable him or her to identify the records in question, the exemption does not apply. (**Order #P-463**)
- Unreported Divisional Court decisions are available to the public even though a member of the public would have to search through the index of proceedings to locate the desired file. (**Orders #159, 191**)
- The Courts of Justice Act states that anyone is entitled, on payment of a fee, to have access to any document filed in a civil proceeding unless an Act or a court provides otherwise. Therefore, these documents are available to the public and subject to this exemption. (**Order #191**)
- In this case, the request was for a list of names of deceased persons whose estates were administered by the Public Trustee. The list of names is something only the Public Trustee possessed and the list itself was not something that was a matter of public record. Although



the information requested could be obtained by checking documents available to the public in the Surrogate Court offices, newspapers and elsewhere, only the Public Trustee had the particular list of names requested. Therefore, this exemption did not apply. (**Order #71**)

- This exemption applies where the record is a transcript of court proceedings, which could be obtained by the public from the Provincial Court Reporters' Office. (**Order #123**)
- The Metropolitan Licensing Commission makes available the decisions of grievance hearing arbitrators for a fee from the Office of Arbitration of the Ontario Ministry of Labour. When the institution advised the requester of this, the exemption applied. (**Order #M-295**)
- Records consisting of transcripts of trial proceedings, factums, appeal books, case books, court notices, court forms, an endorsement and a judgment are available to the public and therefore the exemption applies. (**Order #P-368**)
- The Solicitor General's speech given in the House of Commons is published in Hansard, and as such may be exempt under this section at the institution's discretion. (**Order #124**)
- Where the ministry makes policies and procedures regarding tax assessments available through a public office, the ministry should advise the requester of the specific materials which are so available by referring the requester to the listing in the Directory of Records of by providing the list as part of its decision. (**Order #P-906**)
- The purpose of this exemption is related to matters of convenience. Where the record at issue is a copy of an entire published document, the balance of convenience leans in favour of the institution and the record may be properly withheld. Where the records at issue constitute only a portion of a much larger document, the balance of convenience does not favour the institution. In this case, it would have been necessary for the appellant to search three or more sources to locate and compile the information which was available from the institution on one sheet of paper. As a result, the institution could not rely on this exemption for information that was publicly available from various sources. (**Order #P-729**)

ss.(b)

- To rely on ss.(b), the institution should have custody or control of a copy of the record, which it is prepared to publish within the requisite time period. (**Order #206**)







FIPPA

s.23

MFIPPA

s.16

EXEMPTIONS NOT TO APPLY

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 (FIPPA)/sections 7, 9, 10, 11, 13 and 14 (MFIPPA) does not apply where (FIPPA)/if (MFIPPA) a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.







General

- The compelling public interest override only applies to the exemptions specifically enumerated in this section. (**Orders #1, 123**)
- In this case, the Commission determined that this section may not apply where only a personal interest, and not a public interest is at issue. (**Order #M-217**)
- The Commission ruled that the compelling public interest override can apply in respect of access by an individual to his or her own personal information. The Commission noted that were this not the case, an individual could theoretically have a lesser right of access to his or her own personal information than would a stranger. In this particular case, however, the override was held not to apply. (**Order #P-541**)
- This section cannot be used by people trying to assert only private interests. (**Orders #12, P-270, P-282, P-347**)
- Once the presumption in s.21(3) [FIPPA] \ s.14(3) [MFIPPA] has been established, it may only be rebutted by the criteria set out in s.21(4) [FIPPA] \ s.14(4) [MFIPPA] or by the "compelling public interest" override in s.23 [FIPPA] \ s.16 [MFIPPA]. In this case, the Court ruled that the compelling public interest override did not apply simply because there is an apparent contradiction between a judge's negative comments about the honesty of certain police officers who had given evidence in a criminal trial and an internal Ontario Provincial Police investigation report that exonerated the officers. In the result, the internal investigation report was not released. The Court held that the judge's personal comments made after the trial and his personal interest in the witnesses who testified before him did not have "public significance" and that his comments did not constitute evidence of "public interest." (**Re John Doe et al. and Information and Privacy Commissioner et al. (1993), O.R. (3d) 767 (Div. Ct.), Order #M-170**)
- In order to invoke the compelling public interest override, there must be a compelling public interest that clearly outweighs the purpose of the exemption, as distinct from the value of disclosure to the requester of the particular record in question. The burden regarding applicability of this section falls on the individual seeking the application. (**Orders #24, 47, 55, 61, 68, 72, 123, 124, 149, 159, 164, 180, 183, 196, P-263, P-270, P-332, P-352, M-6, M-7, M-69, M-102, P-442, P-454, P-463, P-506, P-512, P-532, M-173, P-541, M-217, M-235, P-568, M-242, P-607, M-249, P-613, M-265, M-273, M-278, P-648, M-288, P-658, P-710, P-755, P-771, P-797, P-807, P-803, P-813, P-814, P-806, P-805, P-810, M-426, P-828, M-441, P-838**)
- While the burden of establishing the applicability of this provision to particular records is on the appellant, this burden is not absolute. Where the appellant is not familiar with the



contents of the records, the Commissioner will review them with a view to deciding whether this provision applies. (**Orders #P-241, P-263, P-270, P-273, P-286, P-293, P-332, P-347, P-352, M-6, M-7, M-61, M-69, P-506, P-512, P-607, P-613, M-265, M-288, P-658, P-710**)

- The need for public debate in and of itself is not sufficient to outweigh the purpose of the exemptions. The Commission noted that public debate may be restricted when access to government records is denied, but as long as the reasons for denying access fall within the scope of one of the exemptions in the Act, such restrictions are not inconsistent with the principles of the legislation. In this case, the Commission did not accept that the need for government to receive full and frank advice and recommendations was outweighed by the difficulties an individual might have in challenging the powers of a board. (**Order #128**)

#### Does apply

- The appellant alleged that the hiring of the affected person amounted to a breach of security, and placed the integrity of a sensitive section of the Ministry at risk. He raised serious questions about the activities of government, and submitted that the public must know how the alleged incident happened, why it happened and if anything untoward occurred as a result of the breach. The Commission recognized that issues of this nature do rouse strong interest or attention among members of the public, particularly in an age dominated by computer records. Whether there actually was a security risk and whether the Ministry's actions were appropriate is not the issue. It is enough that serious questions have been raised. Thus, the Commission found that section 23 applied and ordered disclosure for the portions of the critical issue sheet which were found to be exempt under section 21. (**Order #P-984**)

#### May Apply

- This case provides an example of an instance where this provision may have applied to records related to nuclear safety but for the fact that the records were otherwise accessible. The Commission noted that all members of the public have the need to know that any safety issues related to the use of nuclear energy, which may exist, are being properly addressed. The Commission stated that "...there is a compelling public interest in the disclosure of nuclear safety-related information...The public interest in the disclosure of the information would be sufficiently compelling as to clearly outweigh the purposes of s.17 [FIPPA] \ s.10 [MFIPPA]." Since the Commission ruled that the exemption did not apply, this provision was not used. **Order #P-270**

#### Does Not Apply

- The records regarding the construction of the retractable roof of the SkyDome were not available under this provision. The records indicated that both the components used in the roof structure and the construction project were inspected frequently and on a number of levels. As well, it was evident that there was a pattern of reporting and evaluative testing where any quality control concerns arose. The records did not show that the construction



posed a safety hazard. (**Order #P-561**)

- While the operation of publicly funded organizations (e.g., hospitals) should be open to scrutiny, the disclosure of specific salaries of the staff is not necessary for this purpose. In this case, the salary ranges of staff were available and this disclosure was sufficient to satisfy the public interest. As a result, this provision did not apply. (**Order #61**)
- The application of this provision does not result in the disclosure of salary information of public officials. Since exact salaries have the benefit of a presumed unjustified invasion of personal privacy, it is unlikely, in most circumstances, that any salary-related information would be available to the public. As is evident from the personal information exemption in clause (4)(a), the legislature intended that salary ranges, not exact salaries, be disclosed. (**Order #M-102**)
- The public does not have a compelling interest in the disclosure of the exact salaries of public officials, which clearly outweighs the privacy protection given in the Act to individuals' salary information. Clause 21(4)(a) (FIPPA)\clause 14(4)(a) MFIPPA) itself incorporates the public interest in that it permits members of the public to obtain salary range information. As a result, the purpose of section 21 (FIPPA)\14 (MFIPPA) includes making salary ranges of public employees available to the public. (**Order #M-18**)
- Where most of a severance package for an employee of an institution is disclosed, the release of the remainder is not required under this section. In determining this, the Commission considered that the personal information exemption is a mandatory one and that most of the information had been released so that the public concerns regarding expenditures of this nature have been addressed. (**Orders #M-173, M-278**)
- Where extensive public hearings are held as a result of a Royal Commission of Inquiry, the public's interest in the subject matter of the Commission's review has been adequately served and this provision would not apply. (**Orders #123, 124**)
- While there is an element of public interest in the disclosure of personal information about victims of crime, in this case it is not a compelling one. (**Order #M-6**)
- This provision was not satisfied where information about an inspection report done to review the operation of a police force was sought. The requester was provided with access to much of the report. The Commission believed that the public inquiry into the issues, which was being held, would deal with the public interest issues. (**Order #P-391**)
- Disclosure of records concerning negotiations between two First Nations bands and a mining company about a proposed mining project was not authorized under this section. In this case, the negotiations were ongoing. When a final agreement exists, the mining company has to submit a formal application to the Ministry of Environment and Energy; at that stage the public is involved in the process. (**Order #P-512**)



- While there is a public interest in obtaining information about the Ontario government's joint business venture with a private sector company, Teranet, to produce a land-based information system, the interest is not compelling. A significant amount of disclosure had already taken place. The Commissioner, in the postscript of the decision, stated that where private sector organizations enter into arrangements with government, they must expect public scrutiny. He suggested that at the time a new arrangement such as Teranet is formed, a public document be prepared by the appropriate institution outlining the nature of the arrangement. The document could identify those who are involved in the arrangement and the nature of their involvement and other information that is not otherwise exempt under the Act. (**Order #P-532**)
- This section did not apply where the institution had released a briefing note to the requester which described in some detail the circumstances under which these Coroner's reports were compiled. The Commission ruled that the level of disclosure provided the requester with an adequate level of understanding of the institution's investigation. (**Order #P-568**)
- This section did not apply to the disclosure of the costs a named company incurred to purchase electricity from Ontario Hydro that was otherwise exempt under s.17 FIPPA \s.10 MFIPPA. Even though the Commission found that the company's rate may be different than that provided to the public at large, and that therefore there was a public interest in the disclosure of the information, the Commission did not find that the information ought to be disclosed under this section. (**Order #P-607**)
- The fact that there is a public interest in having matters determined by the courts, does not, in itself, mean that information ought to be disclosed under this provision to facilitate that court process. The court process does provide an alternative disclosure mechanism and, in any event, the interests being furthered in this case, where information is intended to be used for a civil proceeding, would be private and not public interests. (**Order #M-249**)
- The disclosure of an Ontario Provincial Police investigation report of a named individual was not warranted by virtue of this section. While the Commission noted that the public had an interest in the matter, the report did not recommend that charges be laid and the issue was widely covered and analyzed by the media. As a result, the Commission ruled that this section did not apply. (**Order #P-613**)
- Just because the primary purpose of a police force is to preserve public safety does not mean that any recommendation relating to the operations of a police force are subject to this provision or indeed that it relates to public safety. A report that makes recommendations regarding the improvement of the operations of a police force does not, in this case, have a direct bearing on the safety of the public. (**Order #M-265**)
- Disclosure of the unit prices and the letters of credit provided by a third party in a tender were not disclosed based on this provision. The Commission did not find that the public interest was so compelling as to outweigh the exemptions for commercially valuable information that applied in this case. The Commission noted that the requester received the names of all



contractors and the total amounts of all bids and that the lowest bidder is known to the requester. **(Order #M-288)**

- This provision did not apply to warrant the disclosure of personal information contained in a report of the review of a legal branch of an institution. There was no suggestion in the report that the professional conduct of the lawyers as lawyers was ever at issue. The report was a management review. As such, the fact that the Law Society of Upper Canada provides a code of conduct for lawyers was irrelevant in this matter. **(Order #P-658)**
- In this case, the Commission held that the disclosure to the accused of the Crown brief regarding the accused's prosecution was not envisaged by this section. The Commission noted that the courts provide for a disclosure process for parties to a dispute and that while the conduct of a police officer is a matter of public interest, there was no compelling public interest in this matter. **(Order #M-317)**
- The disclosure of a school board employee's credentials and degrees were not required under this section. The requester believed that the individual acted unprofessionally in counselling certain students, but this interest was not a public interest; rather, it was predominantly personal. **(Order #M-319)**
- The fact that the internal investigation of a police officer was listed on the agenda of a public meeting did not mean that the officer had lost privacy rights and that this provision ought to apply. Nor did the fact that a police officer was investigated for a Code of Conduct offence mean that the public had a compelling interest in the disclosure of the report. **(Order #M-348)**
- The application and evaluative material provided by an organization for a funding grant was not disclosed under this provision. The Commission held that some information had been disclosed and that the criteria for the application had not been met in respect of the remaining information. **(Order P-838)**
- This provision did not apply to the disclosure of competition records to an unsuccessful candidate even though the candidate questioned the fairness of the competition and was contemplating legal action. **(Order #P-924)**
- This provision did not apply to warrant disclosure of documents relating to increases in court fees. In this case, the appellant failed to provide any submissions on how disclosure of the records related to the legal and administrative problems which the appellant argued would result from an increase in court fees. **(Order #P-920)**
- This provision did not apply to authorize the disclosure of personal information concerning a police investigation of a teacher regarding allegations in relation to his students. The fact that proceedings may be held to determine the validity of the teacher's consequent termination did not mean that disclosure of the records to the relevant board of education was required under this legislation. The Education Act and Public Inquiry Act both authorize



disclosure of information by summons. Therefore the public interest in obtaining the information may be addressed by those mechanisms. **(Order #M-539)**

- This provision did not apply to an Agreement of Purchase and Sale of land between a Township and individual purchasers even though the information at issue might be raised in a matter before the Ontario Municipal Board and in a legal proceeding. **(Order M-536)**
- A Collection Agency which has had its licence revoked does not expose the public to potential problems and therefore there is no public interest in the disclosure of the records. **(Order P-952)**
- In this case, a request had been made for a coroner's report regarding an accident in which three people died. Several records pertained to medical information as well as investigative reports prepared by police. The Commission ruled that this provision did not apply. **(Order # P-945)**



## ACCESS PROCEDURE

FIPPA

MFIPPA

s.24

REQUEST

s.17

(1) A person seeking access to a record shall make a request therefor [FIPPA] \ for access [MFIPPA] in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

### SUFFICIENCY OF DETAIL

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

### REQUEST FOR CONTINUING ACCESS TO RECORD

No comparable section

(3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.

### INSTITUTION TO PROVIDE SCHEDULE

(4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,

- (a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and
- (b) a statement that the applicant may ask the Commissioner to review the schedule.

Act Applies As If New Requests  
Were Being Made



(5) This Act applies as if a  
new request were being made on  
each of the dates shown in the schedule.



(See as well, cases summarized under s.48 [FIPPA] \ s.37 [MFIPPA])

### General

- A request sent by fax transmission is a request "in writing" under the Act. The Interpretation Act, in s.29(1), defines "writing" to include words "printed, painted, engraved...or represented or reproduced in any other mode in a visible form." The term "facsimile" is defined in the Concise Oxford Dictionary to include "an exact copy of writing or printing..." While the Act requires that a request for access be in writing, there is nothing in the Act that restricts the method of transmission or delivery of a request. The Act does not require the filing of a request in its original writing. When an institution receives a request by fax, it has no obligation to ensure that it is identical to the original document that was faxed. (**Order #M-207**)
- Where requests are made in the French language, under the French Language Services Act, a ministry is required to respond in French under the Act. However, the ministry is not required to translate any responsive records. This would result in the institution having to create a record in circumstances in which it is not obliged to do so. (**Order #P-562**)
- Institutions should set up logs for incoming mail to ensure that if a requester asks for certain correspondence the institution will be able to find it. (**Orders #79, 85**)
- Clear guidelines are needed regarding records retention schedules. The Commissioner asked the institution to discuss this with the Director of Compliance in order to produce written guidelines regarding the maintenance of personal information banks, and retention and disposal of records. (**Orders #35, 45**)
- The Act does not preclude a requester from submitting the same request more than once. The fact that the institution did not open a new file for the request is not determinative of whether the request was treated as a separate request. (**Order #202**)
- One can only make a request for recorded information. Oral comments made by an employer as a result of a job competition cannot be the subject of an access request where those comments were never recorded. (**Orders #17, 19, 99, 196, M-33**)
- While the Act does not, in most cases, require an institution to create records, or organize them in a particular format, in response to a request, it does give requesters the right to the 'raw material', which would answer all or part of a request. In this case, the Commission ruled that the institution had an obligation to advise the requester that the information sought was in records responsive to other parts of the request, rather than advising the requester that the records do not exist. (**Order #P-533**)



- Where, after a lengthy search, it is determined that no record as described in the request exists, there is no legal requirement to create a record to answer a request. (**Orders #13, 99, P-317**)
- While there is, in general, no duty to create a record, it may in certain circumstances be, consistent with the spirit and purpose of the Act to do so. The Commissioner, however, has no power to order an institution to create a record where there is no requirement to do so. However, in **Order #M-18**, the Commission did require an institution to create a record containing the salary range for a particular position. (**Order #99**)
- The Act does not provide that a requester's reasons for making an access request are relevant to a consideration as to whether access is given. An individual is free to use any records to which he or she has been granted access as he or she chooses. (**Order #P-240**)
- A request may be in the form of a question as long as one may determine from the question what records are sought. (**Order #M-493, P-995, #17, #54, M-530, P-652**)
- Where a request is made for a file, any records contained within the file should be considered responsive to the request. (**Order #P-909**)
- Where a requester has sought identical records in previous requests and where, in the circumstances, no new records would have been created, the institution may rely on its former searches and not conduct a new search. (**Order P-914**)
- In this case, the wording of a request suggested that the requester was seeking an opinion or interpretation of a by-law and not requesting a specific record. The Commissioner ruled that an institution is not bound to create a record or to do legal research for a requester. (**Order #M-577**)
- It is acceptable for an institution to treat a number of requests as one request when it benefits the requester. However, the requester should be consulted before any decision is made to combine requests for the purpose of conducting a search. (**Order #P-260**)
- Where a requester has submitted separate requests for records whose subject-matter is closely related and which have common areas of search, an institution may provide a fee estimate for one comprehensive search for all records responsive to each request. In this case, five separate requests from the same requester for records about the transfer of the Psychiatric Patients Advocacy Office to the Advocacy Commission and interest group reaction to the transfer, were properly combined for the purpose of estimating search costs. The requester should be consulted before any decision is made to combine requests for the purpose of conducting a search. The requester should still be provided with 2 hours of free search time for each of the 5 requests. (**Order #P-943**)



## ss.(1)--Reasonable Search

### Evidence Needed to Establish That Search was Reasonable

- The institution may be asked to provide an affidavit or may on its own volition provide an affidavit outlining the steps it took to locate the requested records. (Orders #24, 58, 59, M-79, M-80, P-415, M-89, P-429, M-111, M-112, P-437, P-445, M-122, M-123, M-124, M-126, P-447, P-457, P-459, M-131, P-465, M-133, M-134, M-135, M-136, M-137, P-467, P-471, P-490, P-477, P-478, P-481, P-483, P-485, P-473, M-160, M-161, P-495, P-506, P-503, P-506, M-172, M-178, M-179, P-535, P-536, M-190, M-191, M-193, M-200, M-206, M-211, M-235, P-596, M-239, P-569, P-572, P-573, M-246, M-248, M-254, P-618, P-619, P-624, M-269, M-270, P-638, P-639, M-275, M-281, M-282, M-283, M-286, M-293, P-652, M-306, M-309, P-646, M-316, M-334, P-695, P-706, P-708, M-338, M-349, P-720, M-354, M-359, P-739, P-743, M-386, M-388, M-391, M-393, P-761, P-762, M-398, M-399, M-401, M-406, M-407, P-786, P-809, M-416, P-789, P-796, P-793, P-815, P-812, P-802, P-799, M-433, M-434, M-435, M-436, P-818, P-825, P-826, P-832, P-835, P-833, P-831, M-442, M-529, M-535, M-537, M-543, M-547, M-550, M-553, M-559, M-563, M-564, M-565, M-577, M-578, M-588, M-589, M-590)
- An institution may satisfy the Commission that a reasonable search had taken place without the necessity of providing an affidavit, where it can establish that the steps were taken in detail. Ultimately, the decision of whether an affidavit is necessary is up to the Commission on an assessment of the facts of each particular case. While the institution is not required to prove with absolute certainty that the requested records do not exist, the institution is required to provide sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to the request. (Orders #P-303, P-313, P-317, P-456, P-464, M-156, M-147, P-476, P-486, M-164, P-511, P-524, P-544, M-199, P-550, P-556, M-208, M-226, M-240, P-592, P-595, P-570, P-599, M-243, M-254, M-255, M-259, M-275, M-276, M-311, M-294, P-645, P-664, P-666, P-681, P-686, P-703, P-708, M-338, M-358, M-379, M-393, P-787, P-819, P-824, P-827, P-830, M-566, P-952)
- The Commission is responsible to ensure that the institution has made a reasonable effort to identify the record responsive to the request; the institution is **not required to prove to the degree of absolute certainty** that the requested record does not exist. In this case, the institution provided affidavit evidence and representations. In the circumstances, having regard to the broad nature of the request and the fact that the record would have been almost 20 years old, the Commission considered that the search was reasonable. (Orders #P-458, M-282, M-315)
- Where an issue has been raised by the requester regarding the reasonableness of the search, the institution is required to establish this to the satisfaction of the Commissioner. Failing that, the Commissioner may order the institution to search its files in the presence of a compliance investigator or to conduct a further search and provide further affidavits as to the results of the search. (Orders # P-211, P-287, P-618, P-708, M-341, P-740, P-747, M-386, P-752, P-753, M-391, P-762, P-787)



- The institution must provide the Commission with sufficient evidence to enable it to conclude that it has discharged its statutory responsibility to conduct a reasonable search for records responsive to the request. The institution must outline the specific steps taken to search for the records, the nature and location of the search, or the types of files searched, together with the identities of the employees conducting the search, and their experience or familiarity with the subject matter of the search. (**Order #P-457, M-547**)
- The institution must provide the Commission with sufficient evidence to enable it to conclude that it has discharged its statutory responsibility to conduct a reasonable search for records responsive to the request. Where the Commission requests that this information be provided by affidavit, it must contain details regarding the specific steps taken to search for the records, the nature and location of the search, or the types of files searched, together with the identities of the employees conducting the search, and their experience or familiarity with the subject matter of the search. If the official maintains that the record does not exist, he or she must provide the reasons for holding such a belief as well as details of inquiries that were made to determine this. (**Orders #P-457, P-471**)
- The Commission is responsible to ensure that the institution has made a reasonable effort to identify the record responsive to the request; the institution is not required to prove to the degree of absolute certainty that the requested record does not exist. In this case, the institution provided affidavit evidence and representations. In the circumstances, having regard to the broad nature of the request and the fact that the record would have been almost 20 years old, the Commission considered that the search was reasonable. (**Orders #P-458, M-140**)
- The Commissioner may order an institution to search its files in the presence of a Commission compliance investigator, where the search originally conducted was not shown to be reasonable. (**Order #P-211**)
- Where the Commission finds that the search was not reasonable, it may order the institution to conduct a reasonable search within 15 days of the Order and direct the institution to obtain information concerning the search from experienced staff. If, as a result of the search, records responsive to the request are found, the Commission may order the institution to provide a decision letter regarding access. (**Orders #M-148, P-601, M-564**)
- The search that the institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located. Where the institution fails to do this, it may be ordered to conduct a further search within 15 days of the date of the Order. It may also be ordered to obtain further information from employees knowledgeable of the institution's records management system. (**Order #P-495**)
- The search that an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be found. While the affidavit supplied by the institution indicates that verbal inquiries were made to determine whether any responsive records might exist, there was no evidence that any physical search of the



institution's holdings actually took place. In this case, the requester sought access to a legal opinion that he believed the institution had in its possession. The Commission ruled that the institution had to show that it had asked its legal counsel about the existence of the opinion. (**Order #P-575**)

- Institutions are required to provide more than a bare statement that the record does not exist or could not be located to put the requester in a reasonable position to decide whether or not to appeal the institution's decision. Institutions are required to provide a full explanation to the requester as to the nature of the search and that the search was conducted by knowledgeable staff. (**Order #M-191**)
- Where the affidavit and other material that the institution provided to the Commission in an appeal were not sufficient in establishing whether a search for records was reasonable, the Commission, may order the institution to conduct additional searches for the records. (**Orders #P-535, P-536**)
- Simply stating, in an appeal submission, that a director had reviewed the file and found no records responsive to the request does not establish the reasonableness of the institution's search. (**Order #P-664**)
- Given that the Act requires that institutions make a reasonable effort to identify records responsive to a request and that the individual has a right of access to his or her own personal information that may be reasonably retrieved, the Commission has the duty to determine on the standard of reasonableness the efforts that the institution undertook to search for the records. The powers of the Commission do not **require** it to enter the premises of the institution to look for records; the Commission may do so in its discretion and may also determine its own process. The institution that asserts that the records do not exist bears the onus of establishing that fact. The Commission held that the intention of the legislature was not to require that it bear the cost burden of undertaking searches of the records of institutions. The institution knows its records, and therefore it is appropriate that it undertake its own searches. As a result, the Commission held that it had the power to order the institution to provide an affidavit as to the reasonableness of the search, though it did not exercise it in this case, and that it could order the institution to conduct a further search for records responsive to the request. The Commission ordered the institution to do the latter. In addition, the Commission ruled that records kept by the privately retained lawyers for the institution were in the control of the institution [see s.10 FIPPA \ s.4 MFIPPA] and that therefore the institution was ordered to search for records responsive to the request, which are in the custody of their lawyers. (**Orders #M-315, P-785**)
- Where a requester could provide no credible evidence to support the existence of records, thorough and detailed searches conducted by the institution were sufficient to determine that records did not exist. (**Orders #P-277, P-383, P-386, M-72, M-73, M-74, M-76, M-93, M-100, P-714**)
- An affidavit from the author of certain records which indicated that the records in question



were created and then destroyed, because in the circumstances they were not needed, is sufficient evidence that the records do not exist. (**Orders #P-335, P-336, P-429**)

- In this case the affidavit was not sufficient in that it did not provide any details as to the nature and extent of the search or the qualifications of the person who undertook the search on behalf of the institution. (**Order #P-986**)

#### Parameters of the Search

- The search for responsive records is determined by the parameters set out in the wording of the request. Where the request is clear and provides sufficient description of the records sought to enable an experienced employee of the institution to correctly identify the responsive records, the search in respect of the request would be appropriate. (**Orders #P-456, M-259, M-275, P-781**)
- The Commission ruled that the institution's reliance on searches conducted with regard to a previous request in reaching the conclusion that it did not have a copy of the requested record was reasonable. The Commission noted that in some instances this approach would not be reasonable. For example, in **M-275**, one request was for personal information and the other was for information of a general nature regarding a particular address. Even though the subject matter was generically similar, the requests were very different. In **M-254**, however, the previous request was submitted only a few months prior to the present request, and it was clear that the requested record fell within the ambit of the previous request as clarified. As well, the amount of search time expended on these searches was considerable. (**Orders #M-254, M-275**)
- Poor record-keeping practices can impede a search to locate records. (**Order #45**)
- It is not acceptable for members of the public to be denied access to records that they would otherwise be entitled to receive, solely on the basis that the institution's records management systems are inadequate or deficient. (**Order #P-350**)
- The institution had conducted a reasonable search for records relating to calls for assistance made by the appellant to the Pickering police in 1965. After reviewing historical records, the institution's automated records and microfilm, the institution searched the former building that housed the records and contacted a former police officer referred to by the appellant as someone who may know about the records. While the records were not located, the Commissioner was satisfied that the search was reasonable. (**Orders #M-9, M-21, P-313**)
- In this case, a retired police officer's notebook was relevant to a request. The police force required that notebooks be destroyed after a certain period. While the time period for destruction had elapsed, the police force contacted the retired officer to confirm that the notes had been destroyed. The Commission ruled that the search was reasonable and that the records no longer exist. (**Order #P-453**)



- While the requester sought a “manager’s” file concerning himself, it was clear that what was meant was the “superintendent’s” files. Since the institution has not searched those files the Commission ordered it to do so. **(Order #P-917)**
- Where a contentious situation in a Ministry was investigated by the Children's Aid Society, it was not reasonable for the Ministry to search for the investigation record only in the office where the investigation was conducted. **(Orders #P-936)**

### **Records responsive to request**

- When an institution creates a record in response to a request, then factual information that places the requested information in context e.g. a disclaimer notice regarding property assessment values is also responsive to the request. **(Order #P-954)**
- Where a request is received for general information which may be located in a portion of a record(s) (as opposed to a request for specific records) an institution is obligated to respond only to the portion of the record which is responsive to the information requested rather than the entire record. Institutions should also consider whether the information at issue is meaningful if it is only a portion of a larger document. In determining which documents are relevant to a request, relevance means responsiveness. Relevancy means anything that is reasonably related to the request. **(Order #P-880)**

### **ss.(2)--Sufficiency of Detail**

- An institution that receives a broadly worded request has three choices: it can respond literally to the request, which may involve an institution-wide search for the records; it can request further information from the requester in order to narrow its area of search; or it can narrow the search unilaterally. If the third option is chosen, the institution must outline the limits of the search to the requester. **(Orders 33, 38, 65, 99, P-287, #P-490)**
- There is no need to clarify a request if the institution knows what is being requested. **(Orders #13, P-221, P-287)**
- Where a request is for information that exists in a format different from that which is asked for, the institution must advise the requester of the existence of the related records. It is then up to the requester to decide whether or not to obtain these related records and sort through and organize the information into the originally desired format. While, with the exception of information stored in a computer, an institution is not required to create a record in a particular format, where the institution undertakes a manual search of its files in order to create a record responsive to the request, it must advise the requester of the situation. In this way prior to undertaking a potentially time consuming and expensive task of creating a record, the institution would know whether the requester is interested in receiving the record in the format requested. **(Orders #50, P-491, P-553)**
- Rather than taking a narrow approach to the Act, an institution's coordinator should meet



with the requester and offer assistance in reformulating a request so that information that a requester is entitled to can be provided. (**Order #99**)

- Upon receipt of a request, the institution must first be satisfied that the request is sufficiently clear that an experienced employee could identify the record. If it is not sufficiently clear, the institution must offer the requester assistance in reformulating the request. The Act does not require the institution to prove to the degree of absolute certainty that the requested records do not exist. (**Orders #P-486, M-172**)
- The obligation to assist a requester in reformulating a request only arises where the request is unclear or broadly worded. Where, as here, the request was detailed and clearly identified the records that were sought the need for clarification did not arise. The institution was obliged to consider the request, locate the records and determine whether or not they were responsive to the specific parameters of the request. (**Order #P-816**)
- Where a requester provides sufficient details on the nature of the records being sought, and has identified numerous specific records, it is not reasonable for the institution to supply affidavits of search with only a general description of search. The institution must provide evidence of the extent and results of the search undertaken for records responsive to each enumerated document type. (**Order #M-537**)
- It is incumbent on the institution to assist the requester in clarifying the request. In this case, the institution was not obliged to create a list of similar real properties in the vicinity of the requester's company's property. However, the institution should have determined which of three possible interpretations was consistent with the requester's intention in submitting the request. (**Order #P-906**)
- Where the institution was unsure about information the requester was seeking, it should have contacted the requester to determine the scope of the request. It should not unilaterally narrow the scope of the request. (**Order #P-1007**)

#### **Continued Access (FIPPA only)**

##### **s.24(3) [FIPPA]**

- Continued access is predicated on the existence of the record at the time the request is received by the institution. (**Orders #82, 164**)
- The continued access provision does not preserve access for other requesters; only the requester, him or herself, can take advantage of this provision. As well, continued access is intended to apply to records produced in a series and not to records where only one edition is produced. (**Orders #164, P-641**)



**s.24(4) [FIPPA]**

- The test for frequency of the continuing access request is one of reasonableness. (**Orders #107, 108**)

**s.24(5) [FIPPA]**

- The decision to grant access to the original request need not automatically be applied on the subsequent dates in the schedule. (**Orders #82, 164**)







## DEFINITION

No comparable section

(1) In this section, "institution" includes an institution as defined in section 2 of the Freedom of Information and Protection of Privacy Act.

## REQUEST TO BE FORWARDED

(1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries

(2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries

to determine whether another institution has custody or control of the record, and, where (FIPPA)/if (MFIPPA) the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

- (a) forward the request to the other institution; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution.

## TRANSFER OF REQUEST

(2) Where (FIPPA)/(3) If (MFIPPA) an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.



#### GREATER INTEREST

(3)(FIPPA)/(4)(MFIPPA) For the purpose of subsection (2)(FIPPA)/(3)(MFIPPA), another institution has a greater interest in a record than the institution that receives the request for access if,

- (a) the record was originally produced in or for the other institution; or
- (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof (FIPPA) /of it (MFIPPA).

#### WHEN TRANSFERRED REQUEST DEEMED MADE

(4) (FIPPA)/(5) (MFIPPA) Where a request is forwarded or transferred under subsection (1)(FIPPA)/(2) MFIPPA) or (2)(FIPPA)/(3)(MFIPPA), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it.

#### Institution

(5) In this section, "institution" includes an institution as defined in section 2 of the Municipal Freedom of Information and Protection of Privacy Act.



## s.25(1) [FIPPA] \ s.18(2) [MFIPPA]

- This provision imposes mandatory and specific obligations on an institution which must be followed. In this case, there was considerable confusion over whether a record existed. The Commission noted that if the proper procedures had been followed, the fact that the report was an oral one could have been communicated to the requester at the time of the institution's response to the original request. (**Orders #58, P-795**)
- An institution is required to transfer a request where it does not have custody or control of the records in issue and where it has knowledge that another institution does have the records in its custody or control. (**Orders #P-666, P-646**)
- The procedural scheme established by the Act clearly contemplates that the government speaks with one voice with respect to requests. Thus, one government institution cannot claim that certain records do not exist because they are held by another ministry. As well, the Commission need not notify other institutions that may have an interest in the records in the appeal. The legislation contains various provisions which contemplate that the institution may canvass other institutions if necessary, eg. transfer the request to the institution which has custody and control, transfer the request to the institution with the greater interest in the record, consult with other institutions before making an access decision. (This consultation is facilitated by means of a time extension). (**Order #P-902**)
- Even when a request is transferred from one institution to another, it is still necessary for the second institution to consider whether another institution has custody or control of the record before informing the requester that the record does not exist. (**Order #59**)
- The Commissioner on an appeal may order the institution to forward a request. (**Order #119**)
- The SkyDome failed to comply with this provision when it did not transfer requests regarding records held by a negotiating committee to the Ministry of Treasury and Economics. The committee was appointed by the Treasurer and reported to the Treasurer regarding the proposed sale of the SkyDome. (**Order #P-386**)

## s.25(2) [FIPPA] \ s.18(3) [MFIPPA]

- The Ministry of Government Services (MGS) was correct in transferring to the Ministry of Correctional Services (MCS) a request for access to an agreement of purchase and sale, which was negotiated between MCS and a third party company. It was evident that MGS had a limited role in the sale of the property and was not involved in the discussions and negotiations surrounding the agreement. (**Order #P-279**)



- Records related to tenders for the operations of jobsOntario training programs in several counties were properly transferred to a community college and a regional municipality under this provision. The Commission was satisfied that these entities operate as independent brokers and that they are solely responsible for the implementation of the jobsOntario agreement entered into with the Ministry of Education and Training. (**Order #P-794**)



Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25 (FIPPA)/18 (MFIPPA), the head of the institution to which it is forwarded or transferred, shall, subject to sections 27 (FIPPA)/20 (MFIPPA) and 28 (FIPPA)/21 (MFIPPA), within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof (FIPPA)/will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.







General

- Institutions that send correspondence by courier should be aware that couriers cannot deliver to a post office box. (**Order #79**)
- Proper notice under this provision has not been given where the decision made is not in accordance with the institution's delegation of authority. As a result, the institution is deemed under s.29(4) [FIPPA] \ s.22(4) [MFIPPA] to have refused access to the records at issue in the appeal. (**Order #P-333**)
- It was not appropriate for a police force to wait until the Police Complaints Commission (PCC) had completed its investigation and returned the file to the police before it responded to a request for access to the records. The police force ought to either obtain the records from the PCC and respond to the request within the time frame of the legislation or transfer the request to the PCC, as the institution with the greater interest. (**Order #M-365**)
- Where an institution does not respond within the 30 days envisaged by this provision, the Commission may order the institution to respond within a shorter period of time without recourse to a time extension. In this case, the Commission ordered the institution to issue a decision letter within 14 days. (**Order #P-751, P-951**)
- The 30-day time period for responding to a request begins on the date the request is originally received, even though a subsequent phone call narrowed the request. This "narrowing" does not amount to a "clarification" of the request. (**Order #P-214**)
- Where a request for access is frivolous, vexatious and constitutes an abuse of process, the Commissioner may impose conditions on the processing of the requester's requests and appeals. The conditions imposed in this case were to limit the number of requests during a specified time period; thereby, negating the requirement for a head to comply with (a) and (b) of this section within 30 days of receiving the request (**Order #M-618**).

Records Index

- The notice must contain a clear general description of the records responding to the request and a reference to the specific section of the Act being used to exempt each record. The provision of a list of the records that are responsive to a request is consistent with this requirement. The list can consecutively number the records and describe them as "document," "memo," "letter," "notes," etc. (**Orders #81, 154**)
- Where large numbers of records are involved, it would be of assistance to requesters for the institution to identify the particular pages or paragraphs that appear most directly responsive to the request. (**Order #P-337**)



## Interim Fee Estimate Authorized

- The interim fee estimate was approved in this case where an affidavit established that search time would take 60.2 hours and cost \$1,746. (**Order #P-700**)

## Interim Notices

- For complex requests, a non-binding "interim" s.26 [FIPPA] \ s.19 [MFIPPA] notice may accompany a fee estimate. This would apply where the requested records are large in number or unduly expensive to produce or where complex consultations are necessary. Familiarity with the scope of the request can be achieved by the head seeking the advice of an employee of the institution who is familiar with the type and contents of the records or the head can base the estimate on a representative, not random, sample of the records. Where this process applies a time extension under s.27 [FIPPA] \ s.20 [MFIPPA] should not be undertaken. If the institution claims a time extension, it must review all the requested records and issue a final decision. If an institution is experiencing a problem because a record is unduly expensive to produce for inspection by a head in making a decision, it may not claim a time extension and then issue an interim decision. The interim notice should indicate whether exemptions will likely be applied and should also include a breakdown of the estimated fees, and a clear statement as to how the estimate was calculated. As in **Order #M-171**, an affidavit to this effect may be provided by the institution. A requester must be provided with sufficient information to make an informed decision regarding payment of fees, and the head must take whatever steps that are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access. Where the record is not large or unduly expensive to produce, and where no complex consultations are necessary, then this procedure does not apply and the institution must provide the requester with both a detailed fees estimate and a decision regarding access within 30 calendar days. (**Orders #81, P-243, P-406, P-425, M-103, P-502, M-171, M-218, P-778, M-555, M-556, M-557, P-938, #184, #185**)
- Until an institution issues a decision on whether access will or will not be granted to the requested records, it cannot provide the requester with a fee estimate. In most cases, the decision will be a final decision; in unusual cases in which the records are unduly expensive to retrieve for inspection, the institution should issue an interim decision according to **Order #81**. This latter situation did not apply here because all the relevant records were located in two offices. Section 57(3) [FIPPA] \ section 45(3) [MFIPPA] (dealing with the requirement to provide a fee estimate) and section 8(1) of Regulation 460 [FIPPA] \ Regulation 823 [MFIPPA] (dealing with the fee waiver) presuppose that an institution has made a decision on whether or not access will be granted when a fee estimate is issued. A requester should know whether access will be received upon payment of the fee estimate. (**Orders #P-502, M-218, M-376**)
- It is not appropriate for an institution to issue a fee estimate for locating a record in circumstances where it cannot reasonably expect to find a record responsive to the request. (**Order #M-172**)



- The commission authorized a fee estimate based on an estimate that two hours of search time would be necessary beyond the two free hours of search. The institution estimated there would be 31 inches of records to search through. **(Order # P-938)**
- The Commission affirmed Order 81 and held that the threshold established by Order 81 for interim access decisions, and the guidelines it sets out for the contents of such decisions, strike a reasonable and appropriate balance between the requirements imposed by this section and the fee estimate provisions of the Act and Regulation. **(Order #M-555)**
- The fact that an institution has received a second request for the same information is not a proper consideration in determining whether to issue an interim or final decision. There is nothing to preclude an institution from passing the cost of the search to the second requester should the first requester choose not to proceed with the request and/or not pay any allowable fees. **(Order #M-376)**
- The interim notice accompanying a fee estimate should indicate whether access will be granted and should contain enough information about the records to allow a requester to decide whether to proceed with the request. **(Order #P-1005)**

#### Interim Fee Estimate not Authorized

- The Commission considered that unless that the records are unduly expensive to retrieve for inspection by the head, e.g. **Order 81**, then the records must be reviewed and a final decision issued. Therefore where 200 letters were responsive to the request, an interim decision was not appropriate. The fact that a search may not produce any records responsive to a request is not a proper consideration in issuing a decision. **(Orders #P-696, M-376)**
- The "interim" decision option as envisaged by **Order #81** is not available where the only basis for the procedure is that the estimated search time to locate a record is 5 hours. **(Order #M-103)**
- The commission authorized a fee estimate based on an estimate that two hours of search time would be necessary beyond the two free hours of search. The institution estimated there would be 31 inches of records to search through. **(Order # P-938)**
- Despite the "interim notice" procedure outlined in the Order, the institution, in this case, because of the delays, was ordered to retrieve all occupational health and safety records involved in the request under appeal and to make a final decision on access within 60 days. **(Order #81)**
- In this case, the Commission ruled that the "interim" decision option was not open to an institution where all the responsive records were available for review by the head in order to make a decision. The "interim" decision option applies where the records are unduly expensive to produce for inspection by the head in making a decision. Where all the records have been obtained, then this procedure cannot apply. Institutions cannot charge a fee under



the Act for reviewing the records. (**Order #M-218**)

- The Commission noted that the interim fee estimate procedure did not apply where the records were already located at the time the fee estimate was issued and the search time was said to be 4 hours. (**Order #P-716**)
- The Commission found that the "interim decision" option did not apply where the type of information on which an access decision is to be made is not voluminous. Thus, where the request was for a list of names of Ontario physicians and the total number of laboratory tests ordered by each physician and where only three distinct categories of information were responsive to the request, the interim fee estimate procedure did not apply. This was so even though the number of physicians may be voluminous and that compiling the record necessitates the creation of a computer program. (**Order #P-778**)
- Records are not "unduly expensive to produce" where computerized records are standardized and the ministry has established guidelines to explain how the records should be prepared for disclosure under the Act. (**Order #P-890**)



## FIPPA

s.27

## MFIPPA

s.20

### EXTENSION OF TIME

(1) A head may extend the time limit set out in section 26 (FIPPA)/19 (MFIPPA) for a period of time that is reasonable in the circumstances, where (FIPPA)/if (MFIPPA),

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
- (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

### NOTICE OF EXTENSION

(2) Where a head extends the time limit under subsection (1), the head	(2) A head who extends the time limit under subsection (1)
--	--

shall give the person who made the request written notice of the extension setting out,

- (a) the length of the extension
- (b) the reason for the extension; and
- (c) that the person who made the request may ask the Commissioner to review the extension.







## ss.1

- The fact that a record is "unduly expensive to produce for inspection" is not grounds for extension of the 30-day deadline. (**Order #81**)
- The institution may be ordered to respond to the requester without charging a fee where the institution's time extension was clearly unreasonable and where, given the date of the appeal, the time reduction is no longer a relevant consideration. (**Order #193**)

## ss.(1)(a)

- The institution must provide sufficient information to persuade the Commissioner that the number of records and the need for consultation justify the length of the extension claimed. (**Order #M-1**)
- The institution must provide sufficient evidence to the Commissioner to establish in precise terms why the time extension is sought. (**Orders #193, 197**)
- The institution must do more than simply assert that satisfying the request would unreasonably interfere with the operations of the institution; it must provide evidence as to how this would occur. Moreover the institution ought to seek the extension within the 30 day time-frame of the Act. In this case despite the fact that the institution had a detailed listing of the records requested, it did not seek the time extension until after the 30 day period had elapsed and made no submissions to the Commission as to the nature and length of the searches necessary to locate the records. Consequently the institution was ordered to provide a final decision to the requester in 11 days and not to charge a fee for the processing of the request other than for photocopying charges. (**Order #M-439**)
- When assessing the length of the time extension, the institution must make its decision as to the amount of extra time required within the initial 30-day period prescribed by s.26 [FIPPA] \ s.19 [MFIPPA]. (**Order #P-234**)
- In this case, the Commission approved a 23-day extension of time regarding 3 requests involving a large number of records. The requests required that the records be carefully reviewed by individuals who were acquainted with the records. Pressing operational requirements in the institution meant that these individuals had other duties that they had to attend to in addition to processing the FIPPA request. (**Order #P-517**)
- A time extension was approved, because of the broad nature of the request. A large number of policies and procedures had to be reviewed in Ottawa, Kingston and Toronto, to ensure that all records responsive to the request were found. The institution noted that the individual who was most familiar with the records was based in Toronto and had to go to the other



cities to review the records. The Commission affirmed that the 39-day time extension was reasonable in the circumstances. (**Order #P-617**)

- In this case, the Commission authorized the time extension of 30 days where the institution was able to establish that meeting the time limits of the Act would unreasonably interfere with its operations. The records included some 300 thick files and the institution indicated that the person who would understand the technical language was not always available because of staff shortages owing to holidays, social contract days and others factors. As a result, the institution's ability to search for the records took longer than envisaged by the Act. (**Order #M-261**)
- In this case, the Commission was not satisfied that the absence of the Director of Engineering Services for a period of three weeks was a relevant factor in determining whether the time extension was appropriate. The institution provided no explanation as to why this particular individual was required to undertake or supervise the search. In addition, some 54 days had elapsed between the time of the initial request to the commencement of the director's leave. The institution did not explain why the search did not take place prior to his or her departure or why no efforts to search had taken place. In addition, the institution failed to provide evidence of the number of records or the volume of records which must be searched. The Commission ruled that the institution failed to provide sufficient evidence that the time extension was reasonable. (**Order #M-307**)
- The time extension of 104 days was authorized by the Commission. The institution stated, through sworn affidavit, that because its filing system did not index cases in the way the request was framed, it would have to search all of its files during the relevant time period. The institution stated that 16,453 files would have to be searched and that it would take a staff member 15 minutes to search each file. The institution submitted that it could not devote a full-time employee to the task. (**Order #P-682**)
- In this case, the time extension of 104 days was not authorized by the Commission. By affidavit, the institution indicated that 467 files would have to be searched and that each file would take 15 minutes to search. The institution shared resources with another institution that received a request involving a number of files. The Commission ruled that this provision is only available for an individual request. Thus, even where institutions share resources, this section cannot be used to extend the time for responding to more than one request. Consequently, the institution was ordered to provide a decision letter regarding access to the records within 15 days of the date of the Order. (**Orders #P-683, P-684**)

**ss.(1)(b)**

- An institution cannot claim an extension of time simply because the same requester makes a number of separate requests that collectively involve a large number of records or necessitate consultation. Each request must be considered separately. An institution that is faced with a number of requests which strain its resources may: 1. negotiate with the requester who sends in numerous requests to "waive" the 30-day period or to prioritize the requests, or 2.



allocate its resources so that when there is the need, additional staff can assist those who routinely work on requests. (**Orders #28, 93, 100, 174, 175, 176**)

- The intent of the legislation is to allow for an extension of time for consultations with persons **external** to the institution. (**Orders #104, 164, 177, 189, 193**)
- While the Freedom of Information and Privacy Branch of Management Board Secretariat is external to the Ministry of Health and does perform a consultative role, consultations with the branch can generally be carried out within the statutory 30-day period. Requests for extensions of time must be reasonable. (**Order #189**)
- In order to ascertain the reasonableness of the request for a time extension, the institution must explain why the consultation will take the amount of time indicated. (**Order #190**)
- The institution must provide sufficient evidence as to the nature of the consultations and why it is reasonable that the consultations should take the time requested. Consultations must be initiated in a timely fashion. (**Orders #193, 197**)
- Where an institution intends to issue interim notices, according to **Order #81**, it cannot rely on this provision. (**Order #P-243**)
- In this case, the Commission accepted that the extension was necessary where the request related to a branch of the institution as well as another institution and where consultations could not be completed within the Act's time frame. (**Order #P-633**)

ss.(2)

- There is a clear obligation on the institution to provide the requester with written notice of an extension after the 30-day period. (**Order #72**)







## FIPPA

s.28

### NOTICE TO AFFECTED PERSON

(1) Before a head grants a request for access to a record,

(1) A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,

- (a) that the head has reason to believe might contain information referred to in subsection 17(1)(FIPPA)/10(1)(MFIPPA) that affects the interest of a person other than the person requesting information; or
- (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f)(FIPPA)/14(1)(f)(MFIPPA),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

### CONTENTS OF NOTICE

(2) The notice shall contain,

- (a) a statement that the head intends to release (FIPPA)/disclose (MFIPPA) a record or part thereof (FIPPA)/ that may affect the interests of the person;
- (b) a description of the contents of the record or part thereof (FIPPA)/ that relate to the person; and
- (c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed.

### TIME FOR NOTICE

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, where(FIPPA)/if(MFIPPA) there has been an extension of a time limit under subsection 27(1)(FIPPA)/20(1)(MFIPPA), within that extended time limit.

## MFIPPA

s.21



## NOTICE OF DELAY

(4) Where a head gives notice to a person under subsection (1), the head

A head who gives notice to a person under subsection (1)

shall also give the person who made the request written notice of delay, setting out,

- (a) that the /disclosure of the (MFIPPA) record or part thereof (FIPPA)/ may affect the interests of another party;
- (b) that the other party is being given an opportunity to make representations concerning disclosure; and
- (c) that the head will within thirty days decide whether or not to disclose the record.

## REPRESENTATION RE DISCLOSURE

(5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make representations to the head as to why the record or the part thereof should not be disclosed.

## REPRESENTATION IN WRITING

(6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally.

## DECISION RE DISCLOSURE

(7) The head shall,

(7) The head shall decide whether or not to disclose the record or part and give written notice of the decision to the person to whom the information relates and the person who made the request within thirty days after the notice under subsection (1) is given, but not before the earlier of,

- (a) the day the response to the notice from the person to whom the information relates is received; or
- (b) twenty-one days after the notice is given, [FIPPA] \ . [MFIPPA]

decide whether or not to disclose the record or part



thereof and give written notice of the decision to the person to whom the information relates and the person who made the request.

#### NOTICE OF HEAD'S DECISION TO DISCLOSE

(8) Where a head decides to disclose a record or part thereof under subsection (7), the head shall state in the notice that,

(8) A head who decides to disclose a record or part under subsection (7) shall state in the notice that,

- (a) the person to whom the information relates may appeal the decision to the Commissioner within thirty days after the notice is given; and
- (b) the person who made the request will be given access to the record or to a part thereof, [FIPPA] \ part [MFIPPA] unless an appeal of the decision is commenced within thirty days after the notice is given.

#### ACCESS TO BE GIVEN UNLESS AFFECTED PERSON APPEALS

(9) Where, under subsection (7), the head decides to disclose the record or a part thereof, the head

(9) A head who decides under subsection (7) to disclose the record or part

shall give the person who made the request access to the record or part thereof [FIPPA] within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision.







## ss.(1)

- Where the notice has not been provided to third parties, the Commissioner may in an interim Order require the institution to provide notice. (**Orders #141, 162, 163**)
- Where a third party that has been given notice under this section provides representations to an institution, access requests for that material are to be treated as general requests, which are governed by the exemptions in Ontario's freedom of information and privacy legislation. While s.52(13) [FIPPA] \ s.41(13) [MFIPPA] states that parties are not entitled to access to another party's representations at the appeal stage, there is no equivalent provision in respect of access to such representations at the request stage. (**Order #78**)
- Access under the Act has not been given where an official from an institution allows an individual to read a record. In this case, the institution allowed the individual to read a complaint letter and later refused the individual access to the letter in response to an access request. The intention of the institution is an important factor in determining whether access under the Act has been provided. One essential element of intention is whether the institution considered the notice requirements of the Act when the individual was allowed to read the documents. In order to be provided with access for the purposes of the Act, there must be some evidence that the institution has treated the matter as coming under the provisions of the Act. (**Orders #162, M-180, P-274**)
- Where the Commission, during an appeal, learns that an institution has provided a requester with access to a record, which includes the personal information of a third party, without first giving that third party notice of the intention to provide access, then the Commission may request that its compliance department investigate these practices of the institution. (**Order #P-681**)

## ss.(2)(b)

- Where a complete copy of the record can not be disclosed to the third party for their decision on its release, the institution should consider providing the third party with a detailed description of the record's contents or a copy of the record in a severed form. (**Order #P-904**)

## ss.(9)

- If third parties do not appeal the disclosure decision to the Commissioner within 30 days, the record must be disclosed. (**Order #16**)







(1) Notice of refusal to give access to a record or part thereof [FIPPA] / under section 26 [FIPPA] / 19 [MFIPPA] shall set out,

- (a) where there is no such record,
  - (i) that there is no such record, and
  - (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or
- (b) where there is such a record,
  - (i) the specific provision of this Act under which access is refused,
  - (ii) the reason the provision applies to the record,
  - (iii) the name and position of the person responsible for making the decision, and
  - (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

(2) Where a head [FIPPA] \ a head who [MFIPPA] refuses to confirm or deny the existence of a record as provided in subsection 14(3)(FIPPA) / 8(3)(MFIPPA) (law enforcement) or subsection 21(5)(FIPPA) / 14(5)(MFIPPA) (unjustified invasion of personal privacy) the head [FIPPA] shall state in the notice given under section 26 (FIPPA) / 19 (MFIPPA),

- (a) that the head refuses to confirm or deny the existence of the record;
- (b) the provision of this Act on which the refusal is based;
- (c) the name and office of the person responsible for making the decision; and
- (d) that the person who made the request may appeal to the Commissioner for a review of the decision.

(3) Where a head refuses to disclose a record or part thereof under subsection 28(7), the head shall state in the notice given under subsection 28(7),

(3) A head who refuses to disclose a record or part under subsection 21(7) shall state in the notice given under subsection 21(7),

- (a) the specific provision of this Act under which access is



refused;

- (b) the reason the provision named in clause (a) applies to the record;
- (c) the name and office of the person responsible for making the decision to refuse access; and
- (d) that the person who made the request may appeal to the Commissioner for a review of the decision.

#### DEEMED REFUSAL

(4) A head who fails to give the notice required under section 26 (FIPPA)/19 (MFIPPA) or subsection 28(7)(FIPPA)/21(7)(MFIPPA) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.



## ss.(1)(b)

- It is implicit in ss.(1)(b) that the head provide the requester with a general description of the records responding to the request. The head must also advise the requester of the specific sections or subsections relied upon as exemptions. (**Orders #81, 154, P-324, P-406**)
- An institution must be reasonably precise in describing severed records so that the notice of refusal accurately reflects the head's decision. (**Order #38**)
- General reasons contained in a notice of refusal would be sufficient if they were accompanied by a more detailed description or index of records. (**Order #P-324**)
- Where a decision letter deals with partial access to a record, it is not always necessary to provide general descriptions of the severed material. In this case, it was apparent on reviewing the severed version of the record disclosed to the requester what the severed portions were, and the severances were clearly marked with the relevant exemption claimed. (**Order #P-482**)

## ss.(1)(b)(ii)

- In this case, the Commission ruled that the institution did not comply with this provision by simply repeating the wording of the exemptions that were claimed. The requester must, by virtue of the reasons provided by the institution, be in the position to make a reasonably informed decision on whether to seek a review of the head's decision. As a result, the reasons must indicate why the institution applied the exemptions to the records. (**Order #P-547, and see also Orders #158, P-235, P-298, P-324, P-482, P-554, P-537, P-547, P-553, P-717 and "IPC Practices", June 1992.**)
- A general decision letter that does not contain any description of the records may comply with this provision where the letter is accompanied by a more detailed index of the records at issue, which describes the contents and subject matter of the records. (**Order #P-554**)
- Where all the records are part of a generic class, an index of records is not required. (**Order #P-717**)
- The utility of an index would be enhanced if for each record the institution included the name of the author and recipient and the subject matter of the document. (**Order #M-457**)
- It is not necessary for an institution to provide a Vaughan-like index to the appellant. The Vaughan Index is an American practice which stems from a fundamental difference between the process under FIPPA and the U.S. Freedom of Information Act because FIPPA appeals



are decided by a quasi-judicial body, that is the Commission and the American systems is based on courts. (**Order #P-880**)

**ss.(1)(b)(i) and (ii)**

- The head is required to provide a requester with the reasons for the application of the exemptions, which form the basis for the head's decision to deny access. Specifying which part of a provision applies to a record is not the equivalent of providing the reason a provision applies. The reason provided to the requester should be sufficient to allow the requester to make an informed decision as to whether to seek review of the head's decision. (**Orders #158, 187, 189, P-235, P-298, P-324, M-90**)
- Where the institution's notice is deficient because the request is a repetition of a previous request by the appellant, and where access to the records had been granted, it would serve no purpose to require the head to issue a new notice. (**Order #187**)

**ss.(1)(b)(iv)**

- In order for this notification to be meaningful it must include a reference to the 30-day appeal period established by s.50(2) [FIPPA] \ s.39(2) [MFIPPA]. Where notification letters fail to state the statutory time limit for appeals they do not meet the mandatory requirements of this section. (**Order #M-430**)
- It is reasonable for an institution to rely on its searches and decision letters from previous requests by the same requester when the requests are the same and where new responsive records are unlikely to have been created. (**Order P-914**)
- When a decision letter does not contain information e.g. an index regarding records that were disclosed from a file, the Commission may require the institution to issue a new decision letter. (**Order #M-563**)



## FIPPA

s.30

### COPY OF RECORD

## MFIPPA

s.23

(1) Subject to subsection (2), a person who is given access to a record or a part thereof (FIPPA)/of a record (MFIPPA) under this Act shall be given a copy thereof (FIPPA)/of the record or part (MFIPPA) unless it would not be reasonably practicable to reproduce the record or part thereof (FIPPA)/it (MFIPPA) by reason of its length or nature, in which case the person shall be given an opportunity to examine

the record or part thereof in                      the record or part.  
accordance                      with                      the  
regulations.

### ACCESS TO ORIGINAL RECORD

(2) Where a person requests the opportunity to examine a record or a [FIPPA] / part thereof (FIPPA)/ and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine

the record or part thereof in                      the record or part.  
accordance                      with                      the  
regulations.

### COPY OF PART

(3) Where a person [FIPPA] \ A person who [MFIPPA] examines a record or a part thereof (FIPPA)/ and wishes to have portions of it copied, the person [FIPPA] shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.







## General

- When access is provided under the Act, the head has no power (except in respect of research agreements) to impose restrictions on the use of the record. The fact that the requester previously obtained possession of the same record outside of the Act does not affect his or her right to obtain access to the record under the Act. (**Order #164**)

## ss.(2)

- It is not reasonably practicable to provide access to an original record where exempt material has been severed from the record. (**Order #2**)
- Subsection (2) does not specifically require an institution to provide requesters with an opportunity to view the record at the location of their choice in the province. The requester's preferred location for viewing may be acceptable if it is reasonably practicable. It is the responsibility of a head to demonstrate that the means of viewing suggested is not reasonably practicable. Undue inconvenience or unreasonable expense as well as the preservation of the security and integrity of the record are important factors. (**Orders #6, 7, 8**)
- The institution provided an affidavit which indicated that it was not reasonably practicable to permit the requester to view the original severed records regarding a job competition without disclosing personal information that is exempt under the Act. The Commission was satisfied that personal information of others would be visible if the originals were examined. (**Order #P-485**)







INFORMATION TO BE PUBLISHED OR AVAILABLE

FIPPA

MFIPPA

s.31

PUBLICATION OF INFORMATION RE INSTITUTIONS

s.24

S.31 (FIPPA) / S.24(1) (MFIPPA) The responsible minister (FIPPA) / Minister (MFIPPA) shall cause to be published annually (FIPPA) / (See ss.(2) MFIPPA) a compilation listing all institutions and, in respect of each institution, setting out,

(a) where a request for a record should be made; /and (MFIPPA)

(b) the name and office of  
the head of the  
institution;

(b) the title of the head of  
the institution.

(c) where the material  
referred to in sections  
32, 33, 34, and 45 has  
been made available; and

No comparable section

(d) whether the institution  
has a library or reading  
room which is available  
for purpose use, and if  
so, its address.

[See above]

(2) The Minister shall cause  
the compilation to be published  
before the first day of  
January, 1992 and at least once  
every three years thereafter.







## FIPPA

### S.32 OPERATION OF INSTITUTIONS

The responsible minister shall cause to be published annually an indexed compilation containing,

(a) a description of the organization and responsibilities of each institution including details of the programs and functions of each division or branch of each institution;

(b) a list of the general classes or types of records in the custody or control of the institution;

(c) the title, business telephone number and business address of the head of each institution; and

(d) any amendment of information referred to in clause (a), (b) or (c) that has been made available in accordance with this section.

## MFIPPA

### INFORMATION AVAILABLE S.25 FOR INSPECTION

(1) A head shall cause to be made available for inspection and copying by the public information containing,

(a) a description of the organization and responsibilities of the institution;

(b) a list of the general classes or types of records prepared by or in the custody or control of each institution;

(c) the title, business telephone and business address of the head; and

(d) the address to which a request under this Act should be made.

(2) The head shall ensure that the information made available is amended as required to ensure its accuracy.







## FIPPA

### S.33 INSTITUTION DOCUMENTS

(1) A head shall make available, in the manner described in section 35,

(a) manuals, directives or guidelines prepared by the institution, issued to its officers and containing interpretations of the provisions of any enactment or scheme administered by the institution where the interpretations are to be applied by, or are to be guidelines for, any officer who determines,

(i) an application by a person for a right, privilege or benefit which is conferred by the enactment or scheme,

(ii) whether to suspend, revoke or impose new conditions on a right, privilege or benefit already granted to a person under the enactment or scheme, or

(iii) whether to impose an obligation or liability on a person under the enactment or scheme; or

(b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public.

## MFIPPA

No comparable section



## DELETIONS

(2) A head may delete from a document made available under subsection (1) any record or part of a record which the head would be entitled to refuse to disclose where the head includes in the document,

No comparable section

(a) a statement of the fact that a deletion has been made;

(b) a brief statement of the nature of the record which has been deleted; and

(c) a reference to the provision of this Act on which the head relies.



(1) A head shall make an annual report, in accordance with subsection (2), to the Commissioner.

CONTENTS OF REPORT

(2) A report made under subsection (1) shall specify,

- (a) the number of requests under this Act for access to records made to the institution;
- (b) the number of refusals by the head to disclose a record, the provisions of this Act under which disclosure was refused and the number of occasions on which each provision was invoked;
- (c) the number of uses or purposes for which personal information is disclosed where (FIPPA)/if (MFIPPA) the use or purpose is not included in the statements of uses and purposes set forth under clauses 45 (d) and (e) (FIPPA)/34(1) (d) and (e) (MFIPPA);
- (d) the amount of fees collected by the institution under section 57 (FIPPA)/45 (MFIPPA); and
- (e) any other information indicating an effort by the institution to put into practice the purposes of this Act.







## FIPPA

s.35 DOCUMENTS

MADE AVAILABLE

## MFIPPA

No comparable section

(1) The responsible minister shall cause the materials described in sections 31, 32 and 45 to be made generally available for inspection and copying by the public and shall cause them to be made available to the public in the reading room, library or office designated by each institution for this purpose.

(2) Every head shall cause the materials described in sections 33 and 34 to be made available to the public in the reading room, library or office designated by each institution for this purpose.







# FIPPA

## s.36 INFORMATION FROM HEADS

Every head shall provide to the responsible minister at the responsible minister's request, the information needed by the responsible minister to prepare the materials described in sections 31, 32 and 45.







PART III

PART II

PROTECTION OF INDIVIDUAL PRIVACY

COLLECTION AND RETENTION OF PERSONAL INFORMATION

FIPPA

MFIPPA

s.37

APPLICATION OF PART

s.27

This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.







(See also, cases under s.21(1)(c) [FIPPA] \ s.14(1)(c) [MFIPPA])

- This provision excludes the privacy provisions of the Act only if the information in question is held by the institution maintaining it for the express purpose of creating a record available to the general public. Other institutions cannot claim the benefit of the exclusion for the same personal information unless they, too, maintain the information for the purpose of making it available to the general public. (**Privacy Investigation Report #I94-011P, September 13, 1994**)
- Even though records are submitted pursuant to a statute which indicates that they will be made publicly available, the records may not be "maintained" for the purpose of creating a public record. Where records containing errors were never made available to the public, this provision does not apply. (**Orders #P-318, P-319**)
- Personal information may be public in one sense and not be publicly available as contemplated by this section. For example, the names and addresses of lottery winners are made public in newspaper accounts when the winners are announced. Winners agree that this be done. This does not mean that the record is a "public" record for all times and in all contexts. Similarly, a criminal record may be disclosed in a public trial but this does not mean that it is a "public" document as envisaged by this provision. In each of these instances, access to the personal information must be made in consideration of the factors in ss.(2) and (3) of this exemption. (**Orders #180, 181, M-68**)
- Witnesses who provide statements to the police do not give up their privacy rights simply because there may be a trial in the future and they may testify in open court. The fact that personal information may be disclosed in a public trial does not mean that the individual who will be involved in the trial waives his or her privacy rights. This is particularly so where the public proceeding has not yet commenced. (**Order #P-392**)
- A tax notice that is mailed to a property owner is a record in the possession of the municipal clerk within the meaning of s.78(1) of the Municipal Act and is (prior to the June 1992 amendment that changed the new s.74(1) of the Municipal Act to state "Subject to the Municipal Freedom of Information and Protection of Privacy Act...") therefore a record available for public inspection. The tax notice is distinct from a certificate of assessed taxes or a certificate of arrears provided to the public under the authority of ss.385 and 408 of the Municipal Act. (**Privacy Investigation Report #I91-52M**)
- Records of court proceedings that are publicly available by virtue of the Courts of Justice Act are not subject to the privacy rules of the Act. This is true even where the same records are in the custody of an institution. (**Privacy Investigation Report #I90-16**)
- The privacy rules do not apply to garnishment orders of a court, which are public



documents. Nevertheless, in keeping with the spirit of the Act, it was recommended that ministry offices address all garnishment-related letters to the named head of the payroll department or other appropriate person. As well, the envelope should be marked "Private and Confidential." (**Privacy Investigation Report #I90-16**)

- The privacy rules apply to personal information disclosed by a Cabinet Minister in the Legislative Assembly. (**Privacy Investigation Report #I91-29P**)
- An "information" (criminal charge laid against an accused) laid during criminal proceedings is a public record and, as a result, the privacy rules do not apply to the record. (**Privacy Investigation Report #I91-54P**)
- In keeping with the privacy rules when discussing sensitive personnel matters, a Board of Education should go into a closed meeting under s.207(2) of the Education Act. A recommendation, which is worded so as not to disclose sensitive personal information, should then be presented to the board in an open meeting under s.207(1) of the Education Act to ratify the decision. Similarly, the notice provisions of s.268 of the Education Act, (e.g., notice to the teacher regarding the reasons for dismissal) should be complied with without publicly disclosing personal information. (**Privacy Investigation Report #I91-70M**)
- In determining whether or not to hold an open meeting in which personal information will be disclosed, a municipality should be guided by the disclosure provisions of the Act. (**Privacy Investigation Report #I91-42M**)
- Unless a court has ruled that a statement of claim filed as a result of a civil proceeding is not available to the public, it is, as a result of the Courts of Justice Act, a public document. As a result, the record may be disclosed and the privacy rules do not apply. (**Privacy Investigation Report #I92-28P**)
- Once an Information, charging an individual with an offence, has been laid and filed in a courthouse and is available to the general public, the document is a public record and according to this section the privacy rules of the Act do not apply. (**Privacy Investigation Report #I92-11M**)
- Under ss.34(23) of the Planning Act, letters of appeal regarding a zoning by-law amendment are forwarded from the municipality to the Ontario Municipal Board (OMB). The OMB makes these letters available to the general public. As such, according to this section the privacy rules do not apply. (**Privacy Investigation Report #I92-64M**)
- In this case, the Commission ruled that the names of inmates who were detained in a detention facility prior to trial were subject to the personal privacy exemption. This provision was not discussed. (**Order #P-657**)
- It cannot be said that police are maintaining personal information for the purpose of creating



a record available to the public when: charges against the individual had not yet been laid, documents compelling a court appearance had not yet been signed and an information had not been laid in court. (**Privacy Investigation Report #I92-66P**)

- The Commission received a complaint regarding the disclosure of two letters of resignation. The institution had acknowledged that two letters of resignation of an employee were included in a package made available to the public prior to a Council meeting. The institution, a Council stated that since the first resignation letter was addressed to the Minister of Health, and copied to Council members, the resigning Council Member could have expected the resignation to be a public matter and that the Council "had no ability not to make it a public matter". It was the Council's position that the Council member who addressed the second letter to the Minister had also expected and required his letter of resignation to be made public. The Council was of the view that these letters had already been copied to a number of people and had been made public by the writers themselves. Therefore in the institution's view the information was a "public record". The Commission determined that the personal information about the complainant contained in the resignation letters could not be said to be maintained for the purpose of creating a record that is available to the general public. The Commission also noted that the Council could have publicly noted the resignations without releasing the actual letters containing the complainant's personal information. (**Privacy Investigation Report #I94-023P**)
- The Commission concluded that a public reprimand of a named employee for providing confidential information to a reporter was not in accordance with this section. The Commission held that the institution did not maintain the information concerning the complainant's reprimand for the purpose of making it available to the public. (**Privacy Investigation Report #I93-053M**)
- An institution cannot disclose personal information about an employee simply because the personal information is revealed in a published decision of the Grievance Settlement Board (GSB). This section may be relied upon to exclude a record from the privacy requirements of the Act only if the institution itself maintains the personal information "specifically" for the purpose of creating a record available to the general public. This is not the case with regard to a published GSB decision. (I94-030P) (**Privacy Investigation Report #I93-053M**)







## FIPPA

s.38

### DEFINITION

## MFIPPA

s.28

(1) In this section and in section 39 (FIPPA)/29 (MFIPPA), "personal information" includes information that is not recorded and that is otherwise defined as "personal information" under this Act.

("renseignements personnels")

### COLLECTION OF PERSONAL INFORMATION

(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.







ss.(2)

- Where an institution has the option of allowing employees to submit insurance claims directly to the insurer, it cannot be argued that the collection and processing of the forms by the institution for the insurer on behalf of employees is "necessary" to the proper administration of a lawfully authorized activity. Such collection is not necessary even where direct claims filed by the employee may result in a modest increase in cost to the institution. **(Privacy Investigation Report #I91-46M)**
- A collection under this subsection must be directly relevant to the law enforcement activity. Only the minimal amount of personal information that is necessary should be collected. **(Privacy Investigation Report #I90-04)**
- A collection of personal information regarding a potential fraud in respect of the receipt of welfare payments is a collection for a law enforcement purpose. **(Privacy Investigation Report #I90-04)**
- This subsection would authorize a collection of personal information necessary to determine whether an individual met a requirement under the Co-operatives Corporations Act that directors be at least 18 years of age and not be an undischarged bankrupt. **(Privacy Investigation Report #I89-54)**
- Personal information regarding the finances of a defaulting spouse collected from a trust company for the purpose of the enforcement of a support award is a collection for a "law enforcement" purpose. **(Privacy Investigation Report #I90-72)**
- Where provisions of the Real Estate and Business Brokers Act authorize the collection of personal information to determine fitness for a licence, the collection of personal information must be limited to that which is necessary and relevant to a determination of the individual's ability to perform the job. **(Privacy Investigation Report #I90-62)**
- A collection of the social insurance number as part of a cab driver's licence application was not necessary in order to determine eligibility for a licence. The collection of the social insurance number was not necessary to verify citizenship or authority to work in Canada, to do a criminal records search or to verify identity. The fact that the social insurance number may have expedited the licensing process was an insufficient justification. **(Privacy Investigation Report #I91-03M)**
- When an institution asked employees to indicate the nature of injuries that occurred outside of the workplace and that resulted in illness and non-attendance at work, personal information was "collected" under this subsection, even though employees did not have to answer the question. Under these circumstances, it was not necessary for the institution to



have this information in order for it to reintegrate an employee returning from sick leave. **(Privacy Investigation Report #I91-67M)**

- It was not necessary for an institution to collect social insurance numbers from senior citizens for the purpose of requesting free snow removal. As a result, the Commission recommended that the practice cease. **(Privacy Investigation Report #I92-93M)**
- It was necessary to the proper administration of a lawfully authorized activity for the Family Support Plan to collect health plan numbers and photographs of individuals who have support or custody orders existing against them. This information was necessary in order to trace individuals, assist in enforcing orders and serve documents personally. **(Privacy Investigation Report #I92-38P)**
- It was necessary to the proper administration of a lawfully authorized activity for an institution to collect personal information about its employee where the employee was being investigated because he or she was allegedly also working full-time in another job. The institution had the right under the Labour Relations Act and the collective agreement to discipline employees. The institution needed these records in order to exercise its lawfully authorized management functions, that of discharging one of its employees for just cause. As a result, the institution acted appropriately when it collected personal information gathered by a private investigator who had videotaped the employee working at the other job. **(Privacy Investigation Report #I92-55M)**
- The Liquor Control Board of Ontario had the right to establish and maintain a security system to protect the board's personnel and assets under this provision. In so doing, it could set up surveillance cameras in those entrance and exit areas where this activity could be justified. **(Privacy Investigation Report #I93-026P)**
- An institution does not collect unsolicited personal information where it does not take any steps to compile the information. **(Privacy Investigation Report #I92-32P)**
- A municipality collected T-4 income tax receipts from staff of a day nursery in order to verify salary amounts. The day nursery operated under a service contract with the municipality. The collection of T-4 slips by the municipality contravened s.28(2) because the municipality had the option of requiring the nursery to provide an auditor's statement instead, even though the auditor's statement would result in increased cost to the day nursery. **(Privacy Investigation Report #I92-82M)**
- The institution had the authority to collect an individual's sex and ethnicity information on an employment application form because the collection was necessary for the proper administration of a lawfully authorized program, namely, a special program under s.14(1) of the Ontario Human Rights Code. However, any subsequent collection of the same information on a test conducted to administer the special program would no longer be "necessary" and would not meet the requirements of this provision. The institution already had the information by virtue of the employment application. **(Investigation Report #I92-**



- The phrase "expressly authorized by statute" requires either that the specific types of personal information collected be expressly described in the statute or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected **in a regulation made under the statute**, i.e., in the form or in the text of the regulation. (**Order #M-484**)
- In order for an institution to have "collected" personal information, as envisaged by the Act, that information must have been obtained, gathered, received or compiled from **a source outside of the institution**. Thus, a gathering of employment-related personal information by an official of an institution from another official of that institution would **not** constitute a collection within the meaning of Part III of the Act. (**Privacy Investigation Report #I90-29**)
- A school board did not collect personal information in accordance with the Act when it solicited the names and addresses of potential new students from existing students in order to notify them about its programs. (**Privacy Investigation Report #I94-004M**)
- A school board's administration of employee benefits is a lawfully authorized human resources activity. (**Privacy Investigation Report #I94-001M**)
- It is contrary to this subsection for a person to ask a requester why he needed the information requested under MFIPPA and to seek additional personal information about the requester. In this case, the solicitation of personal information about the requester was unnecessary for the successful processing of the MFIPPA request. (**Privacy Investigation Report #I94-30M**)







# FIPPA

s.39

## MANNER OF COLLECTION

(1) Personal information shall only be collected by an institution

(1) An institution shall collect personal information only

directly from the individual to whom the information relates unless,

- (a) the individual authorizes another manner of collection;
- (b) the personal information may be disclosed to the institution concerned under section 42 or under section 32 of the Municipal Freedom of Information and Protection of Privacy Act [FIPPA] \ under section 32 or under section 42 of the Freedom of Information and Protection of Privacy Act [MFIPPA];
- (c) the Commissioner has authorized the manner of collection under clause 59(c) (FIPPA)/46(c) (MFIPPA);
- (d) the information is in a report from a reporting agency in accordance with the Consumer Reporting Act;
- (e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;
- (f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or judicial or quasi-judicial tribunal;
- (g) the information is collected for the purposes of law enforcement; or
- (h) another manner of collection is authorized by or under a statute.

## NOTICE TO INDIVIDUAL

(2) Where [FIPPA] \ If [MFIPPA] personal information is collected on behalf of an institution, the head shall,

unless notice is waived by the responsible minister,

inform the individual to whom the information relates of,

- (a) the legal authority for the collection;

# MFIPPA

s.29



- (b) the principal purpose or purposes for which the personal information is intended to be used; and
- (c) the title, business address and business telephone number of a public official (FIPPA)/an officer or employee of the institution (MFIPPA) who can answer the individual's questions about the collection.

#### EXCEPTION

(3) Subsection (2) does not apply where

the head may refuse to disclose the personal information under subsection 14(1) or (2) (law enforcement).

(3) Subsection (2) does not apply if,

(a) the head may refuse to disclose the personal information under subsection 8(1) or (2) (law enforcement);

(b) the Minister waives the notice; or

(c) the regulations provide that the notice is not required.



- Collections (and disclosures of personal information under the Act) that occurred prior to January 1, 1991, when the Municipal Freedom of Information and Protection of Privacy Act came into force, are outside of the Information and Privacy Commission's jurisdiction. As a result, actions in this regard that occurred prior to January 1, 1991, cannot be the subject of a privacy complaint. (**Privacy Investigation Reports #I92-38M, I91-24M**)
- Where a student verbally revealed sensitive personal information to an instructor, which the instructor subsequently recorded for future use, the recording of the personal information was a collection of personal information for which the instructor ought to have given notice at the time. (**Privacy Investigation Report #I91-77P**)
- Where the Liquor Control Board of Ontario collected personal information through a system of security cameras, it was required to comply with the notice provisions in this section. While, in some cases, this would frustrate the purpose of the collection, the Commission was of the view that the provision of the notice would serve as a deterrent. It was recommended that the notice be posted at the main and side entrances to the building where the cameras were located. (**Privacy Investigation Report #I93-026P**)
- A notice of collection should be given when an institution collects medical certificates from its employees for the purpose of documenting sick leave. (**Privacy Investigation Report #I92-34P**)

## ss.(1)(a)

- The authorization or consent must be clear, specific and unambiguous and must indicate what personal information is to be collected and from whom it is to be collected. A consent that purports to authorize the collection of "relevant" information will not suffice. (**Privacy Investigation Report #I90-62**)
- For consent to be truly meaningful, that consent must be given on an informed basis and must be voluntary. In this case an employee on sick leave was required to sign a consent for release of medical information directly from her doctor to the institution in order to return to work. It was determined that the employer's indirect collection of personal information was in compliance with the Act, and that the employee's voluntary consent was implied as she altered the form to restrict the amount of information collected. However it would have been better to collect the information directly from the individual. (**Privacy Investigation Report #I94-001M**)

## ss.(1)(c)

- All individuals involved in collecting personal information for the Ontario government's Workplace Discrimination and Harassment Program should be advised of the terms and



conditions under which the Commission has granted authorization for the indirect collection of personal information. The Commission has authorized indirect collection of personal information for the above program, subject to certain terms and conditions, including the conditions that institutions take reasonable steps to ensure that the personal information collected is accurate and up-to-date, and that personal information be disclosed according to the Act. (**Privacy Investigation Report #I93-036P**)

ss.(1)(f)

- Where an institution had reason to believe that an employee was employed by a second employer while in receipt of Workers' Compensation Board benefits, the institution had authority to indirectly collect employment history information about the employee from the second employer in order to prepare for a challenge to the employee's WCB claim either before the WCB or the Workers' Compensation Appeals Tribunal. (**Privacy Investigation Report #I91-84P**)

ss.(1)(f) and (g)

- Collections authorized by these provisions must be directly relevant to the law enforcement activity. Only the minimal amount of personal information that is necessary should be collected. (**Privacy Investigation Report #I90-04**)

ss.(1)(g)

- This subsection authorizes the collection of personal information where a person complains to the Workers' Compensation Board that an injured worker is in fact able to work (and therefore not entitled to compensation). (**Privacy Investigation Report #I89-59**)
- Personal information regarding the finances of a defaulting spouse collected from a trust company for the purpose of the enforcement of a support award is a collection for a "law enforcement" purpose. (**Privacy Investigation Report #I90-72**)

ss.(1)(h)

- Subsection 10(1) of the Assessment Act authorizes an assessor to indirectly collect specific personal information about an individual from any person "present on land" visited by an assessor under the Act. (**Privacy Investigation Report #I91-50P**)

ss.(2)

- A notice of collection should contain each of the three elements described in the subsection. Discussion of matters other than collection (e.g., anticipated disclosure of the information) should be included in a separate paragraph from the notice. (**Privacy Investigation Report #I90-57**)



- The statement of legal authority for the collection of personal information should include the specific Act and section that authorizes the collection. (**Privacy Investigation Report #I90-67**)
- Where a variety of personal information data has been collected, the notice of collection must relate to all of the data that has been collected. Where different personal information data on the form is used for different purposes, or is collected under different legal authority, the various purposes and authority must be included in the notice. In this case, the particular use of the social insurance number was not indicated in the notice, and therefore the notice of collection was inadequate. (**Privacy Investigation Report #I91-03M**)
- Notice must be provided each time personal information is collected. A notice of collection may notify of specific collections occurring in the future when the future collection can be predicted with certainty. Whenever there is ambiguity regarding the sufficiency of the notice, a new notice of collection should be provided. (**Privacy Investigation Report #I91-05P**)
- Where the specific authority for a collection of personal information related to grievance proceedings could not be found in the Crown Employees Collective Bargaining Act (CECBA), and where such authority was provided in the collective agreement, the notice of collection should cite both CECBA and the collective agreement as the legal authority for the collection. (**Privacy Investigation Report #I91-47**)
- The term "supervisor" is too general to be used to identify the official to be contacted under ss.(2)(c). The position title of the person to be contacted should be indicated. (**Privacy Investigation Report #I91-47**)

ss.(3)

- Law enforcement may be relied upon to avoid providing notice in respect of an investigation as recorded in an Eligibility Review Officer's report into potential welfare fraud. The Ministry of Community and Social Services was acting as an agent on behalf of law enforcement agencies. (**Privacy Investigation Report #I90-04**)
- Personal information about a defaulting spouse collected by the Support Custody Orders Enforcement Branch as part of the enforcement of a support award would be subject to the law enforcement exemption, and therefore notification of the collection is not required. (**Privacy Investigation Report #I90-72**)
- Where an institution (acting as an employer) collects personal information in order to prepare for a hearing before the Workers' Compensation Board or the Workers' Compensation Appeal Tribunal, the institution is not acting as a "law enforcement agency." The institution therefore cannot rely on this subsection and is required to notify individuals of any collection that has occurred. (**Privacy Investigation Report #I91-84P**)







(1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information.

#### STANDARD OF ACCURACY

(2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date.

#### EXCEPTION

(3) Subsection (2) does not apply to personal information collected for law enforcement purposes.

#### DISPOSAL OF PERSONAL INFORMATION

(4) A head shall dispose of personal information under the control of the institution in accordance with the regulations.







USE AND DISCLOSURE OF PERSONAL INFORMATION

FIPPA

MFIPPA

s.41

USE OF PERSONAL INFORMATION

s.31

An institution shall not use personal information in its custody or under its control except,

- (a) where (FIPPA)/if (MFIPPA) the person to whom the information relates has identified that information in particular and consented to its use;
- (b) for the purpose for which it was obtained or compiled or for a consistent purpose; or
- (c) for a purpose for which the information may be disclosed to the institution under section 42, or under section 32 of the Municipal Freedom of Information and Protection of Privacy Act (FIPPA)/under section 32 or under section 42 of the Freedom of Information and Protection of Privacy Act (MFIPPA).







## General

- An individual's personal information was "used" when information about the individual was recorded in a memorandum communicating information about the individual to another employee in the institution. (**Privacy Investigation Reports #I91-24P, I91-23P**)
- The municipality's use of the individual's sex and ethnicity information was not in compliance with this section. The municipality had stated that the information would be used for statistical purposes. Instead, the municipality used the information to determine the number of white male applicants versus the number of applicants in the employment equity target groups that would proceed beyond a particular point in the recruitment process. (**Privacy Investigation Report I92-72M**)

## ss.(b)

- In the absence of any reference to a particular intended use of personal information contained in the notice of collection, the intended use of the personal information would not be for a consistent purpose since in the absence of the notification, no reasonable expectation of such use would have been formed. (**Privacy Investigation Report #I91-09M**)
- Where an institution has established and communicated a practice of considering an employee's past performance evaluations for internal job competitions, the subsequent use of the performance evaluation in evaluating suitability for employment is a consistent purpose use of the performance evaluation. (**Privacy Investigation Report #I90-10**)
- The use of the social insurance number on taxicab licences or on file labels is not permissible under this section. Other information such as the date of birth and photographs are sufficient to verify identity on the licence. (**Privacy Investigation Report #I91-03M**)
- When an individual files a complaint against an institution, the institution is permitted to use such personal information about the complainant as is necessary to enable the institution to respond properly to the complaint. (**Privacy Investigation Report #I93-005P**)
- Personal information compiled in personnel files is gathered for general employment-related purposes, which include defending the institution in a human rights complaint laid by an employee. (**Privacy Investigation Report #I92-62M**)
- Fair information practices are predicated on a person's full knowledge of the collection of their personal information. The principles of openness and access to one's files is of the utmost importance. In this case, the complainants did not know of the existence of a second set of personal files and because they did not know this personal information had been collected by their department head. The Commission concluded that they could not



reasonably have expected the use of this information in their dismissal. (**Privacy Investigation Report I94-12M**)



An institution shall not disclose personal information in its custody or under its control except,

- (a) in accordance with Part II (FIPPA)/Part I (MFIPPA);
- (b) where (FIPPA)/if (MFIPPA) the person to whom the information relates has identified that information in particular and consented to its disclosure;
- (c) for the purpose for which it was obtained or compiled or for a consistent purpose;
- (d) if the disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and if the disclosure is necessary and proper in the discharge of the institution's functions;
- (e) for the purpose of complying with an Act of the Legislature or an Act of Parliament
  - or a treaty, , an agreement or arrangement
  - agreement or under such an Act or a treaty;
  - a r r a n g e m e n t
  - thereunder;
- (f) where (FIPPA)/if(MFIPPA) disclosure is by a law enforcement institution,
  - (i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or
  - (ii) to another law enforcement agency in Canada;
- (g) where (FIPPA)/if (MFIPPA) disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof (FIPPA)/ is mailed to the last known address of the individual to whom the information relates;
- (i) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;



(j) to a member of the Legislative Assembly who has been authorized by a constituent to whom the information relates to make an inquiry on the constituent's behalf or, where the constituent is incapacitated, has been authorized by the next of kin or legal representative of the constituent;

(k) to a member of the bargaining agent who has been authorized by an employee to whom the information relates to make an inquiry on the employee's behalf or, where the employee is incapacitated, has been authorized by the next-of-kin or legal representative of the employee;

(l) to the responsible minister;

(m) to the Information and Privacy Commissioner; and

(n) to the Government of Canada in order to facilitate the auditing of shared cost programs.

(j) to the Minister;

(k) to the Information and Privacy Commissioner;

(l) to the Government of Canada or the Government of Ontario in order to facilitate the auditing of shared cost programs.



- Where an institution properly discloses personal information to external organizations (for example, to an external agency performing a service for the institution), the institution should enter into a written agreement with the external organization providing the service to ensure that the privacy of the personal information is protected. The institution should have a written agreement with all external organizations that deal with employee records. The agreement should require that the agency comply with the applicable requirements of the Act and the regulations. The external agency should ensure that the access and privacy requirements are communicated to its staff. The agreement should address retention, disposal and security of personal information, in the event of the termination of the agreement between the agency and the institution. The agreement should provide for the possibility that the agency may cease to operate or go into liquidation or bankruptcy. In this instance, the institution should have the right to inspect, acquire and possess records relating to its employees. The agency should also be required to have adequate procedures in place to enable it to identify records of the institution. In addition, the agency should be required to release pertinent records only to the institution. (**Privacy Investigation Report #I91-45M**)
- Disclosures of personal information that occurred prior to January 1, 1991, when MFIPPA came into force, are outside of the Information and Privacy Commission's jurisdiction. As a result, actions in this regard that occurred prior to January 1, 1991, cannot be the subject of a privacy complaint. (**Investigation Reports #I91-24M, I92-38M**)
- In determining whether or not to hold an open meeting in which personal information will be disclosed, a municipality should be guided by the disclosure provisions of the Act. (**Privacy Investigation Report #I91-42M**)
- A requirement by the Ministry of Consumer and Commercial Relations that applicants under the Real Estate and Business Brokers Act provide their application form to their employer for the employer to verify, constitutes a disclosure of personal information by the applicant not the ministry. (**Privacy Investigation Report #I90-62**)
- In this particular case, the Commission recommended that investigation reports not contain personal information because the reports may, intentionally or unintentionally, be disclosed to third parties. (**Privacy Investigation Report #I91-46P**)
- The IPC stated that the privacy principles of MFIPPA must be followed even when a request for information is made outside of the formal MFIPPA process. (**Privacy Investigation Report #I94-45M**)
- Notations of an employee's personal bank account number, personal calls and home address contained in an institution's cellular phone records may not be disclosed. The institution only paid for the business calls made on the phone. As a result, only the part of the records



that indicate the calls made related to the business of the institution may be released. **(Privacy Investigation Report #I92-66M)**

- Where a complaint was lodged regarding alleged welfare fraud, the institution had no authority under this provision to disclose to the complainant the fact that the individual complained about was not on welfare. **(Privacy Investigation Report #I90-43)**
- The Workers' Compensation Board had no authority to send a letter to an employer indicating that his or her employee was on social assistance. **(Privacy Investigation Report #I92-33P)**
- Disclosure to a newspaper that a named individual was one of four individuals who made the greatest number of access requests was not in accordance with this section. **(Privacy Investigation Report #I93-022M)**

ss.(a)

- Personal information that is not exempt under the Act may be disclosed under this subsection at the initiative of the institution. **(Privacy Investigation Report #I92-27M)**
- It was the Commission's view that this section may only be relied upon in the context of an access request. The Commission also noted that s.63(1) [FIPPA] \ s.50(1) [MFIPPA] does not explicitly refer to "personal information" and therefore, given the purpose of the Act in respect of privacy, the section ought to be interpreted narrowly. Even if authority under s.63(1) \ s.50(1) [as above] permits a head to disclose information where an access request has not been received, in this case the notice under s.28(1) [FIPPA] \ s.21 [MFIPPA] to the individual was not given. Therefore, the disclosure by police of an individual's arrest and pending charges to his or her employer was not in accordance with this section. **(Privacy Investigation Report #I92-66P)**

ss.(b)

- Where explicit consent to disclose personal information has been given by an individual, the specific information for which consent has been given must be identified. **(Privacy Investigation Report #I90-54, Privacy Investigation Report #I94-009M)**
- Where an individual purports to act as an agent under this section, the Commission must balance the right of the individual to be represented by an agent with the institution's obligation under s.3(3) of Regulation 460 [FIPPA] \ s.2(3) Regulation 823 [MFIPPA] to verify the identity of an individual seeking access to his or her personal information and whether or not the agent is properly authorized to obtain such information. If proper authorization cannot be obtained, the institution may either notify the individual whose personal information is at issue and provide him or her with an opportunity to provide representations prior to any decision regarding disclosure of the records or may deal with the validity of the authorizations as a preliminary matter. In determining whether the



institution acted reasonably in refusing to accept certain authorizations, the following factors are relevant: whether the personal information is very sensitive, whether the authorizations preclude the institution from verifying the consent and whether or not the individuals who have allegedly consented have responded to the request for verification made by the institution. Special care would be taken where personal information is being requested about the treatment of vulnerable individuals. Institutions should not assume that requests for personal information by agents are invalid; rather, they should discuss the matter with the individuals involved before determining whether or not to accept the authorizations. (Orders #P-533, M-71, P-455)

- Implied consent may apply where during legal proceedings a lawyer, acting on behalf of a client, agrees to the disclosure of personal information about a client. (**Privacy Investigation Report #I89-65**)
- Where a member of the public had written to MPPs and to the news media concerning taxes that had been levied on his property, the Commission, in a privacy report issued as a result of a privacy complaint made by the individual, found that his actions in contacting the media and in writing the letters did not constitute implied consent when the Minister included certain personal information in correspondence to third parties. In order for consent in this provision to apply the individual must identify the personal information contained in the letter "in particular" and consent to its dissemination. (**Privacy Investigation Report #I94-011P, September 13, 1994**)
- Disclosure of personal information on the application form for a government loan to credit reporting agencies was in compliance with this provision. Individuals to whom loans were provided authorized the ministry or their agents to make all necessary credit investigations or credit reporting. (**Privacy Query #Q94-004P**)
- Where an individual has consented to disclosure of the individual's "employment and character records" for the purpose of providing an employment reference, the institution was permitted to disclose that the employee had been absent due to health reasons or sickness. The consent, however, did **not** authorize the disclosure of the individual's medical diagnosis. (**Privacy Investigation Report #I90-54**)

ss.(c)

- Where personal information has been collected indirectly, a consistent purpose is one in which the use or disclosure is "reasonably compatible" with the purpose for which it was collected. (**Privacy Investigation Report #I89-65**)
- Where an administrative or policy manual provided guidelines for the subsequent use or disclosure of personal information by an institution, disclosure in accordance with the guidelines was found to have been for a consistent purpose. (**Privacy Investigation Report #I89-09**)



- A disclosure by a parole officer to a probationer that a third party had a criminal record was necessary to implement a probation order prohibiting the probationer from associating with anyone having a criminal record. Such disclosure constituted one of the purposes for which the criminal record was compiled. **(Privacy Investigation Report #I89-54)**
- Where an administrative tribunal's practice is to disclose its decision to the parties to the proceeding, disclosure to counsel for one of the parties is permitted under this provision. **(Privacy Investigation Report #I92-11P)**
- A disclosure of personal information by the Workers' Compensation Board (WCB) to a current employer of information concerning an injury sustained by a worker while employed by a former employer was a disclosure for a consistent purpose. Both employers needed the information about current and former injuries in order to understand the WCB's award. **(Privacy Investigation Report #I92-08P)**
- Where a person has made a complaint against an institution, and the institution has retained counsel to advise the institution in responding to the complaint, the institution is authorized to disclose necessary personal information about the complainant to counsel. Such a disclosure ought to be reasonably expected by the complainant. **(Privacy Investigation Report #I91-56M)**
- Photo identification cards worn by employees of an institution, which contained the employee's photo, name, signature and department name constituted a consistent purpose disclosure, since employees ought to have reasonably expected such disclosure at the time of hiring. **(Privacy Investigation Report #I92-31M)**
- Where a patient in a psychiatric hospital is subject to a Lieutenant Governor's Warrant, the hospital officials are authorized under this section to inform Corrections Canada about any changes regarding the terms or conditions of the warrant. This would include the address or location of the patient. In these circumstances, the patient is a dual-status offender such that the Ministry of Health and Corrections Canada are jointly responsible for his or her safe custody. **(Privacy Investigation Report #I92-29P)**
- Where personal information was collected about an employee by an institution to determine whether there was just cause to dismiss the employee, the institution properly disclosed the information at an arbitration hearing. The disclosure was made as a result of the employee filing a grievance that ended in an arbitration. The Commission determined that the disclosure was for a consistent purpose in that the employee would reasonably expect that the institution would disclose the personal information at the arbitration hearing. **(Privacy Investigation Report #I92-55M)**
- This provision authorized disclosure of personal information during a meeting between management and employee representatives where the disclosure was necessary to resolve a grievance. In this case, the personal information was contained in a performance appraisal that was prepared for the purpose of human resource planning. The disclosure to resolve a



grievance regarding a job placement was a consistent purpose. (**Privacy Investigation Report #I92-19P**)

- The disclosure of a medical certificate from an employee's personnel file as evidence in a grievance hearing was authorized under this provision since the employee ought to have expected that any relevant personal information in the personnel file would be used by the employer in a grievance hearing. (**Privacy Investigation Report #I92-34P**)
- The disclosure of the substance of a grievor's allegations to other employees who were witnesses to the alleged events was authorized under this section. The disclosure was made in order to investigate the allegation and respond to the grievance. (**Privacy Investigation Report #I92-18P**)
- An employment application form which stated that in addition to specific references provided, "information may be requested from a source other than those listed" ought to lead the applicant to "reasonably expect" that an institution would disclose his personal information if requested to do so by a prospective employer. The disclosure of personal information was therefore permitted under this subsection. (**Privacy Investigation Report #I94-030P**)
- Disclosure of personal information such as payments received, social insurance number, date of birth and address regarding an application for a government loan to credit reporting agencies was in compliance with this provision. This personal information was disclosed for the purposes of updating or making the necessary credit investigations or credit reporting as stated in the notice of collection of personal information. (**Privacy Query #Q94-004P**)
- The disclosure of the complainant's medical information by the school board's physician to the Assistant Superintendent in order to determine the complainant's fitness for work was in compliance with the Act, however the complainant's privacy would be better protected if the physician disclosed the report to the complainant so that she could review and comment on the report before it was sent to the Assistant Superintendent. (**Privacy Investigation Report #I94-001M**)
- The disclosure by the police to a school board of the fact that a teacher had committed suicide was not authorized by this provision. All the police were authorized to disclose to the board was that the teacher had died. (**Privacy Investigation Report #I92-12M**)
- Where a member of the public had written to a Minister of the Crown concerning taxes that had been levied on his property, disclosure of that information was not within this provision. The ministry would have compiled or obtained the individual's personal information to maintain administrative records or correspondence files about the individual and his property. The Commission found that the individual could not have "reasonably expected" that the specific details collected by the ministry for its files about him would subsequently be disclosed in a Minister's letter to a third party. (**Privacy Investigation Report #I94-011P, September 13, 1994**)



- The Ontario Civilian Commission on Police Services (OCCPS) informed a complainant that it did not have the jurisdiction to undertake an investigation and did not investigate the complaint. The OCCPS, however, investigated a similar complaint and the complainant believed that during that investigation, the OCCPS disclosed to the Police Chief and to two other individuals including the person who had filed the similar complaint that she had also complained about the Police. When the complainant was informed the OCCPS would not be investigating her complaint, her reasonable expectation would likely have been that her involvement was over. The Commission held that the complainant's identity was not disclosed for the purpose for which it had been obtained or compiled, nor for a consistent purpose. Therefore the disclosure was not in compliance with section 42(c). **(Privacy Investigation Report #I94-009P)**

**ss.(c) and (d)**

- A municipality's ambulance service had documentation stressing the confidentiality of information received by the Critical Incident Stress Debriefing Team, of which a staff psychologist was a member. The staff psychologist's disclosure to an employee's supervisor, that the employee had used the services of the psychologist regarding the employee's Workers Compensation Board (WCB) claim for critical incident stress, was not in accordance with these sections. While the ambulance unit had the responsibility to provide information to the WCB, the supervisor did not share this responsibility. As a result, the disclosure by the psychologist to the supervisor was not done on a necessary and proper basis under ss.(d). **(Privacy Investigation Report I92-84M)**

**ss.(d)**

- A municipal council resolution that authorized the disclosure of a list of welfare recipients from the Welfare Administrator to the council to address the councillors' "previously expressed interest and concern" regarding social assistance expenditures was insufficient to satisfy the requirements of this subsection. This provision required that the sharing of personal information within an institution be based on more than an interest or concern; it required evidence that the disclosure was needed and necessary. Since it failed to comply with this provision, the council's resolution was illegal and need not be obeyed. **(H.(J) v. Hastings (County), (1993) 12 M.P.L.R. (2d) 40 (Ont.Ct.Gen. Div.))**
- Municipal councillors are "officers" of the municipality within the meaning of this subsection. **(Privacy Investigation Report #I91-09M)**
- The head of an institution and other senior officials of an institution do not have a right under this provision to review personal information about requesters (including the requesters' names) as part of a review of the amount of time spent by the institution in responding to access requests. **(Privacy Investigation Report #I91-43M)**
- Names and addresses of individuals who have made requests for general records under the Act should not be communicated within an institution other than to staff of the institution's



- The identity of an access requester should not be disclosed within an institution unless such disclosure is necessary in order to respond to the request. (**Privacy Investigation Report #I92-73M**)
- In this case, the MFIPPA coordinator violated this subsection because he disclosed the name, address and unlisted telephone number of a requester to a staff member charged with finding the requested record. The staff person did not need this information in order to locate the requested records. (**Privacy Investigation Report #I94-30M**)
- Although the requester did not make reference to MFIPPA, he did specify when making his request for information held by the institution that his name be kept confidential. When the coordinator disclosed his name to staff so they could retrieve the responsive records, the coordinator was not in accordance with this section. (**Privacy Investigation Report #I94-45M**)
- Where a school board had told staff and students that a teacher at a school had committed suicide, it contravened the Act. The staff at the school did not need to know the cause of the death in order to carry out their responsibilities. (**Privacy Investigation Report #I92-11M**)
- Medical details such as the type of medication prescribed to an employee, which was obtained from a medical certificate submitted as part of a sick leave claim, should not be disclosed to the employee's manager since such disclosure was not necessary for the performance of the manager's supervisory responsibilities. Medical certificates should only be disclosed to those employees who require the record to process benefit or payroll information or who require the certificate in order to perform a human resources function (e.g., grievance administration). (**Privacy Investigation Report #I92-34P**)
- If the requester is making a request on behalf of a corporation or organization, the requester's name and address are not personal information and may be communicated. (**Privacy Investigation Report #I91-18P**)
- An institution that wishes to investigate one of its employees to determine whether just cause exists for termination may do so by hiring a private investigator. In hiring the individual to investigate the employee, certain personal information must be disclosed to enable the investigator to carry on his or her functions. The disclosure is authorized by this section in that the private investigator is acting as an agent of the institution and may therefore obtain personal information that is necessary and proper to perform the function. This privacy investigation report implicitly authorized the practice of sharing personal information with private sector individuals who are retained to perform functions for an institution. (**Privacy Investigation Report # I92-55M**)



- The disclosure of an employee's personnel file to an institution's legal services department for the purpose of defending the institution in a human rights complaint was authorized under this subsection. (**Privacy Investigation Report #I92-26M**)

ss.(e)

- The disclosure of an employee's personal information by a District Health Council to the Ministry of Health was not in compliance where it included job performance information. The District Health Council stated that the information in question was disclosed to comply with an Order-in-Council advising the Minister of Health on the planning and co-ordination of health services in its designated area. The Council further stated that the co-ordination of health services is accomplished in part by the work of the Executive Director and any decision to terminate the Executive Director affects the co-ordination of health services. The Commission found that the word "complying" in section 42(e) indicates that the requirement in question must be **mandatory** in nature. In other words, in order for this section to apply, the Order-in-Council must impose a duty on the Council to disclose the complainant's personal information. While the Ministry was the funding agency for the Council and special budget requirements may have been needed by the Council in order to pay severance to the employee, the Commission was not persuaded that the funding relationship required the disclosure of specific personal information including an allegation of termination. (**Privacy Investigation Report #I94-023P**)
- The Ombudsman Act provides authority for the disclosure of personal information to the Office of the Ombudsman from provincial governmental institutions in accordance with this provision. (**Privacy Investigation Report #I92-41P**)
- Subsections 77(3), (4) and (5) of the Workers' Compensation Act authorize the disclosure of personal information about an employee to an employer. (**Privacy Investigation Report #I90-42**)
- Subsection 85(1) of the Health Disciplines Act states that the discipline committee of the College of Nurses in a hearing into alleged professional misconduct shall "consider the allegations, hear the evidence and ascertain the fact of the case." This provision authorized the Ministry of Health to disclose personal information records on request to the College of Nurses as part of its investigation into a complaint. (**Privacy Investigation Report #I91-43P**)
- Subsection 72(2) of the Workers' Compensation Act requires that all board decisions be communicated to the parties to a proceeding before the board. As a result, when the board disclosed the decision to the parties in this case, it did so in compliance with this section. (**Privacy Investigation Report #I92-09P**)
- This provision provided for the disclosure of the contents of a child's Ontario Student Record to the parent who had access rights. The disclosure was required to comply with the Children's Law Reform Act, subsection 20(5). (**Privacy Investigation Report #I92-14M**)



- Correctional Service Canada (CSC) and the Lieutenant Governor's Board of Review (the "board," now called the Criminal Code Review Board) are jointly responsible for the safe custody of inmates who are the subject of a penal sentence and a Lieutenant Governor's Warrant. These dual-status offenders are registered on the Correctional Services Registry and come under the jurisdiction of the National Parole Board. Where the board disclosed personal information about an inmate to a CSC Parole Officer-in-Charge, it did so under this provision for the purpose of complying with an arrangement under the Criminal Code. The Criminal Code authorized an inmate to be transferred to another place as specified in a Lieutenant Governor's Warrant. The "arrangement" of notifying the parole authorities of the details of the warrant was authorized by this provision. (**Privacy Investigation Report #I92-30P**)
- Section 58 of the Municipal Act does not authorize disclosure under this provision. (**Privacy Investigation Report #I91-42M**)
- When an institution has a health and safety unit with responsibility for the administration of Workers' Compensation Board (WCB) accident claims (under s. 133(1) of the Workers' Compensation Act), disclosure by an ambulance service supervisor to WCB of an employee's personal information was not in accordance with this section. (**Privacy Investigation Report I92-84M**)
- An employee had not asked his union representative to represent him regarding his Workers' Compensation Board (WCB) claim. Consequently any disclosure of personal information, including the existence of the claim, by the employee's supervisor to the union representative when the supervisor sought information as to whether the union representative was in support of the employee's WCB claim was not in accordance with this section. The collective agreement did not authorize the disclosure of personal information to an employee's union representative. (**Privacy Investigation Report I92-90M**)

ss.(f)(ii)

- The Canadian National Railways (CNR) police is a "law enforcement agency" for the purpose of this section. The Ontario Provincial Police were authorized to disclose to CNR police personal information concerning a criminal offence of impaired driving that had been laid against a CNR employee. The employee was intoxicated while on duty on CNR property. (**Privacy Investigation Report #I91-76P**)

ss.(g)

- For this section to apply, the disclosure must be in aid of the investigation undertaken. Since the institution did not initiate an investigation into the complaint, the Commission was of the view that disclosure of a complainant's name would not have aided an investigation into her complaint, because no investigation into it took place. (**Privacy Investigation Report #I94-009P**)



ss.(i)

- This provision is not applicable to a determination as to whether personal information may be disclosed as a result of an access request. The Commission also held that the wording of this provision was not applicable to the disclosure of personal information about the deceased's criminal convictions to his daughter. (**Order #P-679**)

ss.(k)

- Where a collective agreement stipulates that information relating to grievances must be communicated to the chief steward, the chief steward is a "member of the bargaining unit authorized by an employee" within the meaning of this provision. Such disclosure is permissible even where the employee specifically objects to such disclosure and would rather have the matter handled by a different union representative. (**Privacy Investigation Report #I89-26**)



Where personal information has been collected directly from the individual to whom the information relates, the purpose of a use or disclosure of that information

The purpose of a use or disclosure of personal information that has been collected directly from the individual to whom the information relates

is a consistent purpose under clauses 41(b) (FIPPA)/31(b) (MFIPPA) and 42(c)/32(c) only if the individual might reasonably have expected such a use or disclosure.







- In the absence of any reference to a particular intended use of personal information contained in the notice of collection, the intended use of the personal information would not be for a consistent purpose since, in the absence of the notification, no reasonable expectation of such use would have existed. (**Privacy Investigation Report #I91-09M**)
- Where personal information has been collected indirectly, a consistent purpose is one in which the use or disclosure is "reasonably compatible" with the purpose for which it was collected. (**Privacy Investigation Report #I89-65**)
- In respect of the exemptions, the Commission confirmed that reasonable expectation of harm required that the institution establish a clear and direct linkage between the disclosure of the information and the harm alleged. The Commission approved of the position taken by the Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture) [1989] 1 F.C. 47 at 59-60, where the Court indicated that a "reasonable expectation of probable harm" was required. It also approved of the Federal Court Trial Division's decision in The Information Commissioner of Canada v. The Prime Minister of Canada, unreported, November 19, 1992, where the Court stated that the mere "possibility" of harm was not sufficient. The Court held that descriptions of possible harm, even in substantial detail, are insufficient in themselves. Justice Rothstein stated that:

The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantial the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a Court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged...While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality, would...be more difficult to satisfy.

(Order #P-534)







PERSONAL INFORMATION BANKS

FIPPA

s.44

PERSONAL  
INFORMATION BANKS

MFIPPA

No comparable section

A head shall cause to be included in a personal information bank all personal information under the control of the institution that is organized or intended to be retrieved by the individual's name or by an identifying number, symbol or other particular assigned to the individual.







- Personal information that is maintained in a correspondence file and is organized by date of correspondence and not by the name of the correspondent is not a personal information bank. (**Privacy Investigation Report #I91-24P**)







## FIPPA

s.45

### PERSONAL INFORMATION BANK INDEX

The responsible minister shall publish at least once each year an index of all personal information banks

## MFIPPA

s.34

(1) A head shall make available for inspection by the public an index of all personal information banks in the custody or under the control of the institution

setting forth, in respect of each personal information bank,

- (a) its name and location;
- (b) the legal authority for its establishment;
- (c) the types of personal information maintained in it;
- (d) how the personal information is used on a regular basis;
- (e) to whom the personal information is disclosed on a regular basis;
- (f) the categories of individuals about whom personal information is maintained; and
- (g) the policies and practices applicable to the retention and disposal of the personal information.

### ENSURE ACCURACY

(2) The head shall ensure that the index is amended as required to ensure its accuracy.







(1) A head shall attach or link to personal information in a personal information bank,

- (a) a record of any use of that personal information for a purpose other than a purpose described in clause 45(d) (FIPPA)/34(1)(d) (MFIPPA); and
- (b) a record of any disclosure of that personal information to a person other than a person described in clause 45(e) (FIPPA)/34(1)(e) (MFIPPA).

#### RECORD OF USE PART OF PERSONAL INFORMATION

(2) A record retained [FIPPA] \ of use or disclosure [MFIPPA] under subsection (1) forms part of the personal information to which it is attached or linked.

#### NOTICE AND PUBLICATION

(3) Where the personal information in a personal information bank under the control of an institution is used or disclosed for a use consistent with the purpose for which the information was obtained or compiled by the institution but the use is not one of the uses included under clauses 45 (d) and (e), the head shall,

- (a) forthwith notify the responsible minister of the use or disclosure; and
- (b) ensure that the use is included in the index.







- Disclosure of the Ontario Student Record to a school board solicitor who needed it was not a regular use or disclosure and therefore the disclosure should have been recorded in the Ontario Student Record file to indicate that this had taken place. (**Privacy Investigation Report #I92-14M**)







RIGHT OF INDIVIDUAL [FIPPA] \ INDIVIDUALS [MFIPPA] TO WHOM  
PERSONAL INFORMATION RELATES TO ACCESS AND CORRECTION

FIPPA

s.47

RIGHT OF ACCESS TO PERSONAL INFORMATION

MFIPPA

s.36

(1) Every individual has a right of access to,

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
- (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

RIGHT OF CORRECTION

(2) Every individual who is given access under subsection to (1) to personal information is entitled to,

- (a) request correction of the personal information where FIPPA/if (MFIPPA) the individual believes there is an error or omission therein (FIPPA)/ ;
- (b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and
- (c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required be notified of the correction or statement of disagreement.







RIGHT OF INDIVIDUALS TO WHOM PERSONAL INFORMATION  
RELATES TO ACCESS AND CORRECTION

FIPPA

MFIPPA

s.47

SUMMARY OF ORDERS/PRIVACY REPORTS

s.36

- A request for access to personal information about the requester, or for information which is personal information about both the requester and another individual, should be considered under this section and s.49 [FIPPA] \ s.38 [MFIPPA]. (**Order #P-371**)

ss.(1)(b)

- This provision does not contravene the Charter in ss.7 and 11(d). Even though the requested information was a Crown brief deriving from a prosecution, s.11(d) of the Charter did not apply in this context because proceedings under the Act are not in respect of an individual "charged with an offence." The appellant also failed to establish why s.7 of the Charter was contravened. (**Order #P-743**)

ss.(2)

- The term "correction" incorporates three elements: the information in issue must be personal and private; the information must be inexact, incomplete or ambiguous; and the correction cannot be a substitution of opinion. As a result, when an employee wanted a negative performance review changed, this was not done. Where the employer stands by his or her view, a statement of disagreement can be attached to the file. (**Orders #186, P-321, P-382, M-201, M-234, M-227, P-674, M-341**)
- Where cogent evidence exists to establish the validity of a correction to attendance records, the institution must correct the records. It is unreasonable for the institution to disregard this evidence on the basis that it is awaiting the decision of an appeal in the matter. (**Order #P-232**)
- Where errors in factual information are shown by the requester to exist in a record, the institution should correct the information. Where a party who has been granted access to a record disagrees with non-factual, evaluative or opinion information contained in the record, the appropriate remedy is provided under ss.(2)(b). This provision allows the requester to require an institution to attach a statement of disagreement to the information. The Commission does not have the authority to order an institution to substitute one opinion contained in a record for another, nor can it direct an institution to make changes to information that is evaluative. (**Orders #M-201, M-234**)
- The method of correction varies with the nature of the record, the method indicated by the requester and what would be the most practical and reasonable method in the circumstances. In this case in the absence of any indication from the requester, the institution was correct in deleting the disputed information from the record. (**Order #P-448**)

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s.36



- The Commissioner's office has not been empowered to make suggested corrections, including deletions, to information unless the information has been demonstrated to be inexact, incomplete or ambiguous. Where the Commission reviews the evidence and determines that the record was believed to be accurate and complete when it was written, an order for correction will not be made. In this case the remedy available to the requester is to request that a statement of disagreement be attached to the personal information. (**Order #M-234**)
- In this instance, the institution could not verify when the appellant had commenced a developmental assignment. The Commission considered that the start date for the developmental assignment was factually incorrect and that it was a matter that was factual as opposed to opinion. However, because the Commission could not establish the date with certainty, the institution was ordered to amend its records to state that the assignment commenced no later than a fixed date that was capable of verification. (**Order #P-674**)
- The police were not obliged to change how they organize and categorize information which appears on their computer system. Hence, where, under the heading 'Criminal Record' acquittals are included, this manner of keeping the information related to criminal charges is not subject to the correction provision. The Commission accepted that law enforcement personnel who use the records understand the phrase 'Criminal Records' to include more than simply convictions. However, the Commission did find that the codes used by the police regarding the charge to be factually incorrect and therefore subject to this correction provision. In this case, the charge of assault should not have been indexed and coded under the 'murder' designation. The Commission therefore recommended that the code be changed to designate this offence as either 'assault' or 'other.' (**Order #M-341**)
- In this case the police were asked to "correct" portions of an occurrence report that described the requester's actions. The police report quoted the complainant's statement about the requester's actions and as a result the Commission found that it was unreasonable to require the police to delete all false statements made to them. As long as the police accurately recorded the information as it was provided to them the right of correction did not apply. (**Order #M-440**)
- In order for the second part of the test to determine whether or not a correction to a record should be made, the information must be inexact, incomplete, or ambiguous. In this order, the Commission ruled that the difference must be more than just one of semantics. (**Order #M-508**)
- Where an employee had certified a recent skills assessment and the assessment was shown to be accurate, the ministry was not required to replace it with a new assessment that the employee felt more accurately reflected her skills. (**Order #P-947**)



(1) An individual seeking access to personal information about the individual shall make a request therefor (FIPPA)/for access (MFIPPA) in writing to the institution that the individual believes has custody or control of the personal information and shall identify the personal information bank or otherwise identify the location of the personal information.

#### ACCESS PROCEDURES

(2) Subsections 10(2) and 24(2) and sections 25, 26, 27, 28 and 29 apply with necessary modifications to a request made under subsection (1).

(2) Subsections 4(2) and 17(2) and sections 18, 19, 20, 21, 22 and 23 apply with necessary modifications to a request made under subsection (1).

#### MANNER OF ACCESS

(3) Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,

- (a) permit the individual to examine the personal information; or
- (b) provide the individual with a copy thereof.

#### COMPREHENSIBLE FORM

(4)(FIPPA)/(3)(MFIPPA) Where [FIPPA] \ If [MFIPPA] access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner that indicates the general terms and [FIPPA] \ conditions under which the personal information is stored and used.







(See as well, cases summarized under s.24 [FIPPA] \ s.17 [MFIPPA].)

ss.(1)

- The requester has an obligation to provide as much direction as possible to an institution in locating records. A request for "all" records may not be sufficiently descriptive for the purposes of the section. (**Orders #33, 34, 35, 44, 45**)
- If an institution narrows its area of search based on its interpretation of the request, the interpretation and narrowed field of search should be communicated to the requester. (**Orders #33, 34**)
- An institution that receives a broadly worded request can (a) respond literally, (b) request clarification, (c) unilaterally narrow the search and outline the limits of the narrowed search to requester. (**Order #38**)
- This provision does not contravene the Charter in ss.7 and 11(d). Even though the requested information was a Crown brief deriving from a prosecution, s.11(d) of the Charter did not apply in this context because proceedings under the Act are not in respect of an individual "charged with an offence." The appellant also failed to establish why s.7 of the Charter was contravened. (**Order #P-743**)

ss.(2)

- Access under the Act has not been given where an official from an institution allows an individual to read a record. In this case the institution allowed the individual to read a complaint letter, and later refused the individual access to the letter in response to an access request. The intention of the institution is an important factor in determining whether access under the Act has been provided. One essential element of intention is whether the institution considered the notice requirements of the Act when the individual was allowed to read the documents. In order to be provided with access for the purposes of the Act, there must be some evidence that the institution has treated the matter as coming under the provisions of the Act. (**Orders #162, M-180, P-274**)
- This provision only requires notification where an institution is considering granting access to personal information in circumstances where disclosure might constitute an unjustified invasion of personal privacy. If, after reviewing the record, an institution decides not to disclose the personal information, or if it decides that disclosure would not constitute an unjustified invasion of personal privacy, notification is not required. (**Order #P-738**)



ss.(3)

- The institution does not have an unfettered right to decide which method of access the requester may have. The institution must use the same criteria as provided in s.30 [FIPPA\s.23 [MFIPPA] when deciding whether to grant the method of access preferred by the requester. The Commission noted that it would be inconsistent with the spirit and purpose of the Act to interpret this section in such a way as to accord a lesser right of access to a person making a request for personal information than for someone making a request for general records. (**Orders #P-233, P-541, P-820**)
- It is up to an institution, on a case-by-case basis, to satisfy itself as to a requester's identity before releasing personal information to the individual. (**Order #29**)
- Where records of proceedings are available by tape and transcript, the obligation of the institution in respect of granting access under this section depends on the interpretation given to the request. In this case, the institution provided the requester with a transcript of the proceedings and not the tape. The Commission ruled that the request was not for the tape and that therefore access to the transcript was sufficient. In these circumstances, the institution is not obliged to further clarify the matter with the requester. (**Order #P-572**)
- The Commission held that while the Criminal Code Review Board did not have to send the original versions of the audio tapes of its hearings to a requester, it had a duty to copy the tapes on the request of the requester. The Commission also held that it had no duty to transcribe the tapes where as here the requester was not seeking transcripts. The Commission found that reproducing the tapes was straight-forward and did not require expensive or complicated equipment. (**Order #P-820**)

ss.(4)

- A request in the form of questions is acceptable when seeking personal information, but not when seeking general information. (**Order #54**)
- This provision creates a duty to ensure that the average person can comprehend the record. A head is under no duty to assess whether an individual requester can comprehend the record. A perception that the requester may not understand the record cannot justify refusal to disclose. (**Orders #19, P-540, M-199, M-276**)
- The word "comprehensible" must be interpreted according to an objective standard. Given that ss.1, 11(1)(a) and 11(2) of the Human Rights Code (Code) apply to the disclosure of information to requesters under the Act, disclosure to requesters who are visually impaired must be in compliance with the Code. In this case, the institution recognized the requester's special needs by authorizing the requester's vocational rehabilitation counsellor to spend several hours with him to discuss the contents of the file and by transcribing 39 pages of the



file in enlarged print. The requester also reviewed his file in the company of his wife, who was not visually impaired. The institution would have had to expend \$2,668 to transcribe the entire file into enlarged print. In the circumstances, the Commission found that the institution took steps to assist the requester to understand his file and allowed him to effectively access his personal information. The Commission ruled that the Code was not contravened. (**Order #P-540**)

- Where handwritten records of an institution are difficult to read, the test for whether the institution has to type the records or otherwise prepare the record in "comprehensible" form is whether the "average" person could understand the record. However, the police in this case used codes in the handwritten notes which the Commission held would not be comprehensible to the average person. The Commission ruled that the police had a duty to translate the codes into language which would be comprehensible to the average person. (**Order #M-199**)
- Where personal psychiatric information was ordered disclosed to the requester, the Commission encouraged him to have his physician review the records first so that psychiatric terms that were not explained in the report could be explained to him. (**Order #P-675**)







# FIPPA

s.49

## EXEMPTIONS

# MFIPPA

s.38

A head may refuse to disclose to the individual to whom the information relates personal information,

(a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

(a) if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

(b) where [FIPPA] \ if [MFIPPA] the disclosure would constitute an unjustified invasion of another individual's personal privacy;

(c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment

or for the awarding of government contracts and other benefits

or for the awarding of contracts and other benefits by an institution

where (FIPPA)/if (MFIPPA) the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

(d) that is medical information where (FIPPA)/if (MFIPPA) the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;

(e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence; or

or

(f) (FIPPA)/(e) (MFIPPA) that is a research or statistical record.







## General

- The Commission has ruled that when an individual seeks access to his or her own personal information, this Part of the Act applies, and not the Part of the Act that deals with general exemptions. Moreover, where this section applies it is the record as a whole that is considered, and not only those parts or aspects of the record that contain the individual's own personal information. This section accords an individual greater rights to access his or her own personal information than does the personal information exemption in s.21 of [FIPPA] / s.14 of [MFIPPA]. This distinction emphasizes the special nature of requests for one's own personal information, and the desire of the legislature to give institutions the power to grant access in situations where responsive records also contain the personal information of another individual or individuals. In these instances, where a record contains the personal information of the requester, then disclosure is determined under this section. (**Order #M-352**)
- Any information which relates directly or indirectly to an individual or a matter which involves the individual could be considered personal information for the purposes of a request and for determining fees. Thus where the police were asked for all information related to a charge laid against an individual, all the information kept in this regard is the individual's personal information even where some of the pages only indirectly relate to the individual or his or her matter. (**Order #M-514**)

## ss.(a)

- Personal information contained in a report prepared for an in camera meeting may be withheld at the discretion of the institution if the record is exempt under the Act. (**Order #M-64**)
- This provision provides an institution with the discretion to refuse to disclose an appellant's personal information where sections 12 - 22 (7 - 12 MFIPPA) apply to the information. (**Order #M-523**)

## ss.(b)

(See as well, cases summarized under s.21(2) and (3) [FIPPA] \ s.14(2) and (3) [MFIPPA])

General

- This section is a discretionary exemption and even if the disclosure of the information would be an unjustified invasion of another individual's privacy, discretion can be exercised in favour of disclosure. (**Orders #37, P-377, P-375, P-381, P-392, P-399, P-401, P-403, P-407, M-22, M-28, M-54, M-56, P-360, M-57, M-63, M-75, M-82, M-88,**



P-417, P-428, M-95, M-122, M-125, P-447, P-449, P-466, P-473, P-492, P-494, P-499, M-199, P-549, M-199, M-198, M-202, P- 548, P-550, P-597, P-598, M-211, M-212, P-589, M-243)

- Where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information would not constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his or her own personal information, access should only be denied if it can be demonstrated that disclosure would constitute an unjustified invasion of another individual's privacy. In **M-347**, the Commission ruled that the 'secret files' kept regarding certain staff of an institution were accessible by those staff members. (**Orders #M-347, M-110, P-440**)
- In determining if disclosure would constitute an unjustified invasion of another individual's personal privacy, a Head must consider all relevant circumstances and need not be restricted to the specific criteria in the Act. (**Order #14**)
- A requester sought information about himself that was contained in correspondence provided to the ministry by the appellant. Information that is about both the requester and the appellant was properly released where the information about the appellant was neither highly sensitive nor provided with an expectation of confidentiality. Therefore, the disclosure would not constitute an unjustified invasion of personal privacy. (**Order #P-371**)
- Complaint information about the activities of a student at a College was implicitly supplied in confidence and contained highly sensitive information about affected persons. As a result the institution correctly applied the exemption. (**Order #P-377**)
- This section is a discretionary exemption and even if the disclosure of the information would be an unjustified invasion of another individual's privacy (including a presumed invasion of privacy), discretion can be exercised in favour of disclosure. (**Order #M-449**)
- This section may be claimed to prevent unjustified invasions of personal privacy with respect to records containing the requester's personal information. In this case, the requester is a public body. By definition, information about the requester cannot be its personal information since it is not an individual and this section is not applicable. (**Order #M-539**)
- This provision was not applicable to records about a deceased affected party kept by the Ministry of the Solicitor General and Correctional Services regarding a coroner's report into the accidental death of the requester's family. Death records concerning the affected party were unrelated to the requester though all the parties died in a motor vehicle accident. (**Order #P-945**)



## Internal Workplace Investigations

- Where records are produced in the course of employment-related complaints, fairness demands that the person complained against be given as much disclosure of the substance of the allegations as is possible. The degree of disclosure would depend on the circumstances of the individual case but should be more extensive if the complaint is likely to result in employee discipline. (**Orders #37, 46, 74, 116, 121, 130, 139, 157, 182, 196, P-272, P-283, P-284, P-297, P-301, P-312, P-322**)
- The appellant requested access to any records that interpret her complaints about allegations of harassment and summaries of her descriptions of the actions on which her complaints were based. Other individuals were named in the records that were requested. In the result, the records were disclosed because to do so would not unjustifiably invade the personal privacy of the other individuals. (**Order #P-360**)
- Letters from inmates complaining about an employee of the Ministry of Correctional Services contain personal information about the employee and the inmates and others referred to in the letters. As a result, the employee's right of access to the letters is subject to this provision. (**Order #P-297**)
- In an internal employment-related investigation, the names and telephone numbers of other individuals identified in the record were supplied in confidence and would be "sensitive" information. However, the comments of the individuals, in anonymized form, would be disclosed. (**Order #157**)
- The personal privacy of a complainant and a witness has not been unjustifiably invaded where their recorded statements made during an internal investigation for sexual harassment are disclosed to the individual to whom they relate. In the absence of other factors, such as safety or security of the witnesses, the right of the alleged perpetrator to a fair determination of rights is paramount. The timing of the request is also another factor. Witness statements should be recorded fully and accurately and should be shown to the witness for verification before they are relied upon. (**Orders #182, M-84**)
- Where a record of a complaint made against an employee was investigated internally, the personal information was of the employee and others. The Commission accepted that in the balancing of factors in the personal information exemption clauses (2)(e), (f) and (i) are relevant. In the result, the personal information of the affected party and of other named individuals was not disclosed. (**Order #P-399**)
- Complaint information sent by concerned citizens about an alleged trespass to property was the information of both the complainants and the alleged trespasser. In this case, the complaint information was not released because it would have unjustifiably invaded the privacy of the complainants. (**Order #P-401**)
- Records that derived from a sexual harassment investigation were disclosed to the alleged



harasser by the institution, in this instance, because the personal information was of both the alleged harasser and of the complainant. Given that this provision is a discretionary exemption, the Commission acknowledged the institution's right to disclose the information under this provision. (**Order #P-549**)

ss.(c)

- All three parts of the test must be satisfied in order to rely on clause (c) "Evaluative" and "opinion" connote a personal or subjective interpretation of objective facts; for example, test scores, ratings and grades. Reference letters containing only factual material such as employment position dates and reasons for termination are not included. The use to which this personal information is used does not determine whether it is evaluative or opinion material. The personal information itself must be evaluative or opinion material. (**Orders #157, 170, 192, P-238, P-240, M-82, M-132, P-595**)
- In order for the exemption to be applicable, the record must be prepared "solely" for the purpose indicated in the Act. As well, the record must be "compiled" by the institution and not simply forwarded to the institution without solicitation. (**Orders #192, 194**)
- This section addresses two competing interests: 1. the right of an individual to have access to his or her own personal information; and 2. the need to protect the flow of frank information to provincial and municipal institutions so that appropriate decisions can be made respecting the awarding of jobs, contracts and other benefits. In order to satisfy the third part of this provision, the institution must consider the following factors: 1. the expectations of the provider of the opinion or evaluative material and the institution regarding the confidentiality of the provider's identity at the time that the information was supplied to the institution; 2. the ordinary practice and/or experience of the individual who provided the information and of the institution that sought the information with respect to maintaining the confidentiality of the source of the information; 3. the knowledge of the individual about whom the information relates as to the identity of the provider of the specific opinion or evaluative material and the individual's expectation as to whether the identity of the provider would be held in confidence; and 4. the nature of the opinion or evaluative material itself, insofar as it would identify the provider of the information. (**Orders #M-132, P-595, P-773**)
- Records created during an investigation into an allegation of workplace harassment are not "compiled solely to determine suitability...for employment." As a result, this provision does not apply. (**Order #M-82**)
- This provision is not restricted to external reference checking. Where the institution and the referee reasonably assumed that the identity of the referee would be held in confidence, as where such expectations are written in the forms filled out by the referee or in other documentation, then this provision would apply. (**Order #P-773**)
- In this case, a welfare administrator sought information from a former employer about a welfare recipient who had been dismissed by the employer. The identity of the former



employer was held to not be provided in confidence under this section. The former employee knew the identity of the former employer and knew that he or she would be contacted. (**Order #M-571**)

- Allegations of employee misconduct or records created during an investigation into an allegation of workplace harassment are not "compiled solely to determine suitability...for employment." As a result, this provision does not apply. (**Order #M-82, M-586**)

ss.(d)

- This section does not give the head discretion to disclose a record "with an explanation." Either the prejudice contemplated by the section can be reasonably expected as a result of disclosure or it will not. (**Order #19**)
- Where the medical information is not current, the institution has to provide sufficient information to satisfy the Commission that it is reasonable, despite the intervening time period, to expect that the disclosure would affect the mental or physical health of the individual. (**Orders #P-259, P-399**)
- This exemption does not apply where the assessment is not sufficiently current to find that disclosure could reasonably be expected to prejudice the mental health of the appellant. (**Order #P-399**)
- In this case, the Commission ruled that this provision did not prevent the disclosure of a psychiatric report about the requester. While the report was the result of a court-ordered assessment made in the context of a criminal proceeding, the police force had not provided sufficient evidence that probable harm was reasonable. The mere possibility of harm was not sufficient. (**Order #M-312**)

ss.(e)

- This provision allows an institution to deny access to a requester's own personal information where the information is a correctional record and release of the information could reasonably be expected to reveal information that was supplied in confidence. Removing the names of individuals who provided information may not be sufficient to protect their identities. (**Orders #64, P-421, P-748**)
- A record that contains information received by Ministry of Correctional Services employees about an inmate's application for temporary leave of absence was exempt under this provision. The third party provided this information in confidence. (**Order #P-421**)
- A requester's probation and parole file was exempt under this provision. These records were held to be correctional records, the contents of which were provided in confidence. (**Order #P-748**)



## ss.(d) and (e)--"Reasonable Expectation"

- In respect of the exemptions, the Commission confirmed that reasonable expectation of harm required that the institution establish a clear and direct linkage between the disclosure of the information and the harm alleged. The Commission approved of the position taken by the Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture) [1989] 1 F.C. 47 at 59-60, where the Court indicated that a "reasonable expectation of probable harm" was required. It also approved of the Federal Court Trial Division's decision in The Information Commissioner of Canada v. The Prime Minister of Canada, unreported, November 19, 1992, where the Court stated that the mere "possibility" of harm was not sufficient. The Court held that descriptions of possible harm, even in substantial detail, are insufficient in themselves. Justice Rothstein stated that:

The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantial the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a Court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged...While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality, would...be more difficult to satisfy.

(Orders #P-534, and in respect of this exemption, Order #P-595)



PART IV/PART III

APPEAL

FIPPA

MFIPPA

s.50

RIGHT TO APPEAL

s.39

(1) A person who has made a request for,

(1) A person may appeal any decision of a head under this Act to the Commissioner if,

(a) access to a record under subsection 24(1);

(a) the person has made a request for access to a record under subsection 17(1);

(b) access to personal information under subsection 48(1); or

(b) the person has made a request for access to personal information under subsection 37(1);

(c) correction of personal information under subsection 47(2), or

(c) the person has made a request for correction of personal information under subsection 36(2); or

a person who is given notice of a request under subsection 28(1)

(d) the person is given notice of a request under subsection 21(1).

may appeal any decision of a head under this Act to the Commissioner.

TIME FOR APPLICATION

(2) An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

NOTICE OF APPLICATION FOR APPEAL

(3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned and any other affected person of the notice of appeal.



OMBUDSMAN ACT NOT TO APPLY

No comparable section

(4) The Ombudsman Act does not apply in respect of a complaint for which an appeal is provided under this Act or the Municipal Freedom of Information and Protection of Privacy Act, or to the Commissioner or the Commissioner's delegate acting under this Act or the Municipal Freedom of Information and Protection of Privacy Act.



**PART IV/PART III**

**APPEAL**

**FIPPA**

**s. 50**

**SUMMARY OF ORDERS/PRIVACY REPORTS**

**MFIPPA**

**s.39**

**ss.(1)**

- The Commission has the jurisdiction to consider the relevancy of the records to the request submitted by the appellant. (**Ministry of the Attorney General v. Anita Fineberg, Inquiry Officer, and John Doe, June 30, 1994, Ontario Divisional Court.**)
- The Commission has jurisdiction to determine a Charter challenge to the provisions of the Act. However, the Commission has ruled that it must be convinced by a clear and compelling argument that the sections of the Act which the appellant seeks to impugn are inconsistent with the Charter. (**Orders #106, P-254, M-341, M-352, P-743, M-380**)
- The Commission has the jurisdiction to consider whether the decision letter issued in response to a request is in compliance with the Act. (**Order #P-717**)
- When an institution does not provide notice to a third party under the Act, the third party cannot appeal the institution's decision to the Commissioner. (**Order #P-295**)
- Where records subject to an appeal had been adjudicated upon by the Commission in a previous order with respect to the same appellants, the Commission will consider that the records fall outside of the scope of the appeal. (**Order #P-666**)
- This provision in the Act permits the requester to appeal any decision of a head even when full access is granted by the institution. (**Order #P-954**)

**ss.(2)**

- The requirement that a requester appeal within 30 days after notice is given by an institution is to be interpreted liberally in favour of access to the process. Where there is no prejudice to the institution, appeals launched after the 30-day period may be allowed. Each case will be considered on its own facts. (**Orders #155, P-293, M-430**)
- This appeal was within the 30-day period because the requester's "narrowed" request, made after the response of the institution to its original request, was considered by the Commission to be a new request. Therefore, the 30-day time period commenced from the response to that request, and not the earlier one. (**Order #M-156**)
- The decision to respond to an appeal that has been filed beyond the 30 days lies with the

**FIPPA**

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head. However, where the head, as here, failed in the notification letter to advise the requester that the appeal must be filed within 30 days, then the institution cannot rely on the strict adherence to the time limit. As a result, the Commission held that the appeal which was filed 45 days late could proceed. (**Order #M-430**)

- Where an institution did not inform a requester of his right to appeal within 30 days, the institution cannot then argue that the appeal should not be heard because it was initiated after the 30 day period had expired. (**Order #P-856**)
- An appellant's right to appeal whether additional responsive records existed was preserved beyond the usual 30 day period in circumstances where the requester first received copies of records during an appeal inquiry and could only have made a judgement during the inquiry stage as to whether further documents ought to exist. (**Order #P-971**)

ss.(3)

- The Ontario Divisional Court ruled that decisions of the head as to relevancy may be appealed to the Commission and that where the Commission considers relevancy of records it must notify the parties to the appeal and provide them with the opportunity to make submissions according s.52(13) [FIPPA] \ s.41(13) [MFIPPA]. (**Ministry of the Attorney General v. Anita Fineberg, Inquiry Officer, and John Doe, June 30, 1994, Ont. Div. Ct.**)
- In this case, involving a large number of affected parties, notice was provided by placing an advertisement in a local newspaper on two separate days. (**Order #M-30**)
- The procedural scheme established by the Act clearly contemplates that the government speaks with one voice with respect to requests. Thus one government institution cannot claim that certain records do not exist because they are held by another ministry. As well, the Commission need not notify other institutions that may have an interest in the records in the appeal. The legislation contains various provisions which contemplate that the institution may canvass other institutions if necessary, eg. transfer the request to the institution which has custody and control, transfer the request to the institution with the greater interest in the record, consult with other institutions before making an access decision (this consultation is facilitated by means of a time extension). (**Order #P-902**)



FIPPA

MFIPPA

s.51

MEDIATOR TO TRY TO EFFECT SETTLEMENT

s.40

The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.







(1) Where (FIPPA)/If (MFIPPA) a settlement is not effected under section 51 (FIPPA)/40 (MFIPPA), the Commissioner shall conduct an inquiry to review the head's decision.

PROCEDURE

(2) The *Statutory Powers Procedure Act* does not apply to an inquiry under subsection (1).

INQUIRY IN PRIVATE

(3) The inquiry may be conducted in private.

POWERS OF COMMISSIONER

(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III (FIPPA)/Parts I and II (MFIPPA) of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

RECORD NOT RETAINED BY COMMISSIONER

(5) The Commissioner shall not retain any information obtained from a record under subsection (4).

EXAMINATION ON SITE

(6) Despite subsection (4), a head may require that the examination of a record by the Commissioner be of the original at its site.

NOTICE OF ENTRY

(7) Before entering any premises under subsection (4), the Commissioner shall notify the head of the institution occupying the premises of his or her purpose.

EXAMINATION UNDER OATH

(8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry and, for that purpose, the Commissioner may administer an oath.



## EVIDENCE PRIVILEGED

(9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.

## PROTECTION

(10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or at [FIPPA] \ any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person.

## PROTECTION UNDER FEDERAL ACT

(11) A person giving a statement or answer in the course of an inquiry before the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*.

## PROSECUTION

(12) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with a requirement of the Commissioner under this section.

## REPRESENTATIONS

(13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

## RIGHT TO COUNSEL

(14) The person who requested access to the record, the head of the institution concerned and any affected party may be represented by counsel or an agent.



ss.(1)

- The Divisional Court ruled, in dismissing a judicial review application, that the Information and Privacy Commission had conducted a fair hearing. The Court noted, in an endorsement, that "[t]he fact that [the municipality] failed to do more than baldly state its position does not detract from the fairness of the Inquiry Officer's conduct of the hearing." (**The Corporation of the Township of Maidstone v. Kathleen Starzacher and Information and Privacy Commissioner\Ontario, January 10, 1994, Ont. Div. Ct., Justices White, Dunnet and Jenkins**)
- The Ontario Divisional Court ruled that institutions have a duty to provide sufficient submissions to the Commission during an inquiry. The Court stated that "Clearly, sufficient information and reasoning has to be provided to the Officer in order that he or she may make an informed assessment of the reasonableness of the expectations required by [the exemption, in this case]." Where brief submissions are made, the Commission is entitled to determine the matter based on that information. However, the Court also noted that "exemptions are to be approached in a sensitive manner, recognizing the difficulty of predicting future events..." (**Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Ont. Div. Ct.)**)
- The Commission has the power to control the process by which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to develop rules and procedures for parties to an appeal. It also includes the authority to decline to consider discretionary exemptions which are raised late in the appeals process. Prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. The Commission has stated that, effective March 1, 1993, institutions will be permitted to raise new discretionary exemptions only within a limited time frame--up to 35 days after the appeal has been opened. The initial notice sent out by the Commission specifies the deadline for claiming new discretionary exemptions. The Commission has the authority to decline to consider discretionary exemptions claimed after the deadline. It will do so in "extenuating circumstances" only. (**Orders #P-658, M-364, P-345, P-373, P-537, M-409, 164, P-797, M-420, P-820, P-832**)
- In rare circumstances an affected party may be allowed to raise the application of a discretionary exemption to a particular record, even where it is not raised by an institution during the course of an appeal. The affected party cannot, however, rely on the exemption and the Commission has no obligation to consider it. The Commission may consider a new exemption raised by an affected party where it is evident that disclosure would affect the rights of an individual, or where the institution's actions would be clearly



inconsistent with the application of a mandatory exemption. (**Orders #P-257, P-280, P-391, M-10, M-36, P-500, P-549, P-590, P-609, P-706, P-746, P-777, M-409, M-419, P-805, P-806**)

- The procedures for processing appeals that have been developed by the Commission provide that representations be made in writing. Where an institution has made complete representations that clearly set out its position, the Commission will not depart from its standard procedures to not allow for oral submissions. (**Order #P-494**)
- An institution cannot require that the Commission hold an oral hearing; the Commission determines its own process for the hearing of appeals. Where the adequacy of a search is at issue, the affidavit of the head or a delegate is what the Commission has determined is necessary to establish the facts. Once the affidavit is reviewed, the Commission will determine whether oral representations are necessary. (**Orders #M-59, P-494, P-567**)
- Where an institution claims a discretionary exemption by indicating in its submissions that the exemption "may" apply, the Commission may decide not to address that exemption in the inquiry. (**Order #M-262**)
- The Commission did not allow a third party individual to raise the closed meeting exemption (s.6 MFIPPA) in an appeal regarding access to his personal information. The exemption was not raised by the institution and the rights of the third party would not be seriously jeopardized if the record was released. (**Order #M-419**)
- Once the appeal process is undertaken and a requester has clarified the parameters of the records requested, the requester cannot at a later date expand upon these parameters. (**Order #P-895**)
- Once the appeal process is undertaken and a requester has clarified the parameters of the records requested, the requester cannot at a later date expand upon these parameters. (**Order #P-895**)
- In this case, because a party to an appeal raised the issue of compelling public interest and requested an oral hearing, it was granted. The case involved allegations of sexual abuse by a teacher. (**Order #M-539**)
- The requester can not expand the nature of the request during the appeal process. In addition once an appellant has narrowed an appeal, the appellant can not reintroduce the excluded information later. (**Order #P-972**)
- The Divisional Court found that where there was overwhelming evidence of a reasonable expectation of harm, and no evidence to indicate there was no harm, the Commissioner



came to a patently unreasonable answer in finding that there was no harm. (**Re Workers' Compensation Board and Mitchinson, Assistant Information and Privacy Commissioner, (1995), 23 O.R. (3d) 31 (Div. Ct.)**)

ss.(4)

- The Divisional Court ruled that this provision authorizes the Commission to have produced to it "any document" [at 4]. The Court also ruled that this provision applies to all parts of the Act in order to allow for a procedural mechanism to ensure that records are provided to the Commission in order for it to decide matters of substance. (**Ministry of Health v. Information and Privacy Commission, June 29, 1994, Ont. Div. Ct. (affirmed Order P-623)**)
- The Commission ordered an institution to produce what were allegedly clinical records covered by s.65(2) [FIPPA], because in its view the words "this Act does not apply" in s.65(2) did not take away the Commission's powers to decide, on a review of the records, whether they were in fact "clinical records." Section 35(5) of the Mental Health Act, in the Commission's view authorized this disclosure to them in order to review the head's decision as to whether the records were in fact clinical records and whether, therefore, they were outside of the purview of the Act. (**Order #P-623, affirmed on judicial review, as above.**)
- The Commissioner, in this particular case, decided an appeal on the basis of a representative sample of records. (**Order #P-314**)
- The Commissioner can inspect any record including those records that are subject to the confidentiality provisions of another statute. (**Order #9**)
- The Young Offenders Act (YOA) regulates access to records that identify a young person as having been dealt with under the Act. Because the Information and Privacy Commission is not listed in the YOA as a party that may receive records, the Commission cannot receive the records on an appeal. However, the Commission did rule that it had the right to receive an affidavit that set out the nature of the record and verified that it was a young offender record under the YOA. (**Order #P-378**)
- Despite **Order P-378**, the Commission ruled that it did have the right to review what an institution determined were 'young offender' records to assess whether in fact they were records governed by the Young Offenders Act and therefore whether the Commission had jurisdiction to deal with them. (**Orders #P-736, P-737, P-804**)
- The Commission ordered an institution to provide records that the institution alleged were records governed by the Young Offender Act (YOA). While acknowledging that the



YOA records provisions prevail over Ontario's access and privacy legislation, the Commission ruled that in order for it to determine whether the records were in fact subject to the YOA record provisions it had to first examine the records. In so doing the Commission noted that for it to do so did not result in a conflict with the scheme of the YOA as contemplated by Multiple Access Ltd. v. McCutcheon, [1982] 2 SCR 161 and Bank of Montreal v. Hall, [1990] 1 SCR 121. It held that none of the provisions give exclusive authority to any particular court or other body to determine whether a record is subject to the YOA and that where the Commission decides whether a record is a YOA record Parliament's legislative purpose in respect of YOA records is not frustrated. **(Order #P-804)**

- Records that relate to a compliance investigation regarding an alleged breach of privacy are not privileged under this section. The privilege in this provision relates to records provided in an inquiry and a privacy investigation is not an inquiry. Access to the records are therefore governed by the exemptions available in the legislation. **(Order #P-404)**

ss.(8)

- In this case, the Commission received an affidavit during an inquiry that purported to be a consent to the disclosure of sensitive personal information from one individual to another. The Commission stated that it had the responsibility to ensure that the consent was authentic and in these circumstances it was not convinced and as a result did not rely on the affidavit. **(Order #P-455)**

ss.(9)

- This provision applied to copies of appeal submissions supplied by an affected person to the Commissioner's office which were copied to the institution's FIPPA coordinator. This provision applies to correspondence between the Commissioner's office and a party to the appeal which is exchanged following the inquiry stage of an appeal and which relates directly to the disposition of an appeal or the contents of any records that have not previously been disclosed. **(Orders #P-592, P-666)**
- Records that relate to a compliance investigation regarding an alleged breach of privacy are not privileged under this section. The privilege in this provision relates to records provided in an inquiry and a privacy investigation is not an inquiry. Access to the records are therefore governed by the exemptions available in the legislation. **(Orders #P-404, P-586)**
- Where the records at issue were generated during the Commission's mediation or pre-inquiry stage, this section has no application. **(Orders #P-537, P-666)**



- A note to file describing a conversation between an employee of the institution and the Commissioner's office following the issuance of an Order, which contained no reference to the records at issue in the appeal or to matters of substance relating to an appeal was not exempt under this provision and, because no exemption under the Act applied to it, was ordered disclosed to the requester. (**Order #P-592**)
- Correspondence between the Commissioner's office and an institution exchanged following the inquiry stage and which related directly to the disposition of an appeal is not privileged under this provision. Such correspondence is nevertheless outside of the purview of the Act (see s.10 [FIPPA] \ s.4 [MFIPPA], **Order #P-537**). However, correspondence between an institution and the Commissioner's office, which are of a purely administrative nature and do not pertain directly to the substance of an appeal, are not privileged under this section and are within the purview of the legislation. Since no other exemptions under the Act applied to the record, it was ordered disclosed. (**Order #P-592**)
- Internal institutional memos regarding the disposition of various records resulting from an Order of the Commission are not privileged since they are not correspondence between the institution and the Commission and they were not prepared during the course of an inquiry. Other records of communications between the institution, third parties and the Commission relating to an inquiry are privileged. (**Order #P-666**)
- It is not necessary that the decision to withhold records referred to in this section be part of the delegation of authority regarding the head's powers. (**Order #P-586**)

ss.(13)

- The Ontario Divisional Court ruled that this provision "imposes a mandatory obligation on the Officer to provide the person making the request, and others as specified, with an opportunity to make submissions." The Court found that a party to an inquiry has the right to be told that the Commission is considering that certain records provided by the institution are irrelevant to the appeal and to be provided with the opportunity to make submissions. On a judicial review application, the Court found that the failure of the Commission to advise the parties to the appeal prior to making the determination as to relevancy, and the failure to provide an opportunity to make submissions, was sufficient to overturn the decision of the Inquiry Officer. (**Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Ont. Div. Ct.) and Order P-759, applied in Orders M-420, M-423, P-816**)
- The Ontario Divisional Court ruled that where a requester changes his/her request for records, the head of the institution and other affected parties should be given another opportunity to make representations. (**Lincoln County Board of Education and**



**Information and Privacy Commissioner/Ontario, Ontario Divisional Court, June 20, 1995, Court File No. 289/93, Justices McMurtry, Sanders and Winkler).**

- The Ontario Divisional Court accorded the Commission curial deference regarding the appeal process, subject to procedural fairness. In consideration of this provision, the Court held that the process ought not to preclude the Commissioner and his staff from discussing submissions with the parties, including referring to earlier decisions made by the Commissioner. If the Commission had considered not following an earlier decision, it would have been appropriate for it to notify the parties accordingly. However, since it followed precedent, it was not necessary for it to notify the parties that it was doing so. Moreover, the Court ruled that the Commission has the discretion to extend the time for making submissions. (**Corporation of the Town of Gravenhurst v. Information and Privacy Commission et al., as yet unreported, November 30, 1994, Ontario Divisional Court, Court File No. 479/92, affirming Order #M-23**)
- While the provision states that no person is "entitled" to access to the representations made to the Commissioner, this does not mean that such access is prohibited. The representations of an institution may be disclosed to a requester "in a proper case" where procedural fairness requires such a disclosure. However, disclosure of the representations will be ordered only in exceptional cases and only where reference to the record at issue has not been made. (**Orders #78, 164, P-434, P-590**)
- Even where the request for access to the submission provided during an appeal is directed to the institution, this provision is applicable. (**Orders #164, P-207, P-345**)
- There is no statutory right for an institution other than the one that has responded to an access request to be a party to an appeal; rather, it is the responsibility of the Commissioner or his delegate to consider the circumstances of a particular appeal and determine if any other person should be given the status of an "affected party," based on the necessity or desirability of having those persons participate. The ability of an institution to transfer a request to another institution that has a greater interest means that consultations take place. This ensures that all viewpoints are considered by the institution and that the institution is in a reasonable position to present the government's position as a whole. This approach is necessary in order for the Act to work effectively. (**Order #P-395**)
- In this case the issue of custody and control of board members' notes had implications beyond the scope of this appeal. As a result, a group representing the chairs of certain provincial agencies, boards and commissions was added as an "affected party" and provided with a opportunity to submit representations. (**Order #P-396**)



ss.(14)

- Where an individual purports to act as an agent under this section, the Commission must balance the right of the individual to be represented by an agent with the institution's obligation under s.3(3) of Regulation 460 [FIPPA] \ s.2(3) Regulation 823 [MFIPPA] to verify the identity of an individual seeking access to his or her personal information and whether or not the agent is properly authorized to obtain such information. If proper authorization cannot be obtained, the institution may either notify the individual whose personal information is at issue and provide him or her with an opportunity to provide representations prior to any decision regarding disclosure of the records or may deal with the validity of the authorizations as a preliminary matter. In determining whether the institution acted reasonably in refusing to accept certain authorizations, the following factors are relevant: whether the personal information is very sensitive, whether the authorizations preclude the institution from verifying the consent and whether or not the individuals who have allegedly consented have responded to the request for verification made by the institution. Special care would be taken where personal information is being requested about the treatment of vulnerable individuals. Institutions should not assume that requests for personal information by agents are invalid; rather, they should discuss the matter with the individuals involved before determining whether or not to accept the authorizations. (**Orders #P-533, M-71, P-455**)
- The Commission ruled that when appeals are filed under the Act, the provincial government must speak with one voice. Where a ministry has assumed the responsibility for processing an access request, it is that ministry which should speak for and represent the interests of the provincial government as a whole. With this in mind, the Commission was not prepared to direct that Order P-902 be reconsidered. Therefore the Commission did not allow an additional ministry to respond to the appeal. In light of the sensitivity of the documents, however, (Grandview) the Commission allowed the institution, i.e., MCSS, a further opportunity to make representations. MCSS would be free to consult with the Ministry of the Attorney General. (**Order #P-965**)

s.52(4)

- In this case the Commission only reviewed 24 resumes and job applications of the 127 that were relevant to the appeal. The Commission considered that the 24 records were a representative sample of all the relevant records. (**Order #P-975**)







FIPPA

s.53

BURDEN OF PROOF

MFIPPA

s.42

Where (FIPPA)/If (MFIPPA) a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.







- Where the head refuses access to a record, or a part of a record, the burden of proof that the record or any part falls within an exemption lies upon the head. If a third party appeals the head's decision to release a record, the onus falls to the third party. (**Orders #3, 49, 65, 80, 101, 166, 204, P-228, M-10, M-29**)
- The onus to show reasonable expectation of harm is on the head. (**Re Workers' Compensation Board and Mitchinson, Assistant Information and Privacy Commissioner, (1995), 23 O.R. (3d) 31 (Div. Ct.)**)







FIPPA  
s.54

ORDER

MFIPPA  
s.43

(1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

(2) Where (FIPPA)/If (MFIPPA) the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

TERMS AND [FIPPA] \ CONDITIONS

(3) The Commissioner's order may contain any terms and [FIPPA] \ conditions the Commissioner considers appropriate.

NOTICE OF ORDER

(4) The Commissioner shall give the appellant and the persons who received notice of the appeal under subsection 50(3)(FIPPA)/39(3)(MFIPPA) written notice of the order.







## General

- Where the Commission has issued an Order indicating that an exemption claimed by an institution does not apply, the institution may charge fees under the Act to the requester for access to those records. The Act is based on a user-pay principle and there is a mandatory requirement to charges fees [see s.45(1) MFIPPA \ s.57(1) FIPPA]. In addition, from the perspective of the access system as a whole, a decision that a government organization must issue a fee estimate in situations where it reasonably believes that the records to which the request will be withheld from disclosure would not facilitate the efficient processing of access requests. As a result, where an institution has decided not to disclose records that are subject to an access request and the Commissioner's office subsequently orders that these records be disclosed, the institution has the right to require that the appellant pay the requisite fee before releasing the records. In these situations, the institution would not be required to disclose the records until the payment was received or the reasonableness of the amount charged is resolved in a subsequent appeal. (**Order M-372**)
- Where the institution has not made any submissions in respect of the exemptions that may apply to records in an appeal, the Commission may order the institution to disclose the records with severances made regarding the applicable mandatory exemptions. (**Orders #P-304, M-374**)
- The introduction by the head of new or different grounds for refusing access to records at the appeal stage will be permitted. It is preferable, however, to set out the grounds in full, prior to an appeal. (**Orders #15, 22**)
- The institution may be asked to provide an affidavit outlining the steps it took to locate the requested records. (**Orders #58, 59**)
- The compliance auditor can conduct a review of the correspondence tracking procedures followed in the Minister's office as a result of an appeal. (**Order #58**)
- In keeping with the policy of the Act, the Commissioner may consider facts that have arisen subsequent to the head's decision. The institution is also free to change a decision in light of subsequent circumstances. All relevant facts must be considered. (**Order #67**)
- Where an institution failed to provide representations, the Commissioner may order the institution to respond by affidavit within 20 days. (**Order #92**)



- Where an institution fails to make submissions, the Commission on an appeal will consider any relevant information that might be contained in the records themselves. (Order #M-77)
- The Commissioner may make an interim Order. (Order #86)
- In circumstances yet to be fully established, the Commissioner has the jurisdiction to determine a Charter challenge to the Act during an appeal. (Order #P-254, P-301)
- The Commissioner may defer the final determination of an appeal until he or she receives further submissions. (Order #92)
- The Commission may reopen an Order and reconsider the application of exemptions where, through oversight, all affected parties had not had an opportunity to make submissions. (Order #P-435)
- The Commissioner may order an institution to provide access without a fee charge where the institution could not justify a time extension. (Order #P-855)

### Application for Reconsideration

- A tribunal may reconsider a decision it made and its flexibility to do so is greater than that of a court. See Chandler v. Assn. of Architects (Alta.) (1989), 40 Admin.L.R. 128 (SCC), Grillas v. Minister of Manpower and Immigration (1972), SCR 577 (SCC), Severud v. Canada (Employment and Immigration Commission) (1991), 47 Admin.L.R. 190 (FCA), Re City of Kingston and Mining and Lands Commissioner et al. (1977), 18 OR (2d) 166 (Div.Ct.)

The Information and Privacy Commission has issued a "Policy Statement" concerning when reconsideration of a decision may be made. It states as follows:

There is no express statutory provision in the Acts which permits the Office of the Information and Privacy Commissioner (IPC) to reconsider an order. However, it is the IPC policy that decision makers may reconsider orders in exceptional circumstances. The circumstances in which an order may be reconsidered are summarized in this policy statement.

When an application for reconsideration of an order is received, the order should be reconsidered only where:

1. there is fundamental defect in the adjudication process (for example, lack of procedural fairness) or some other jurisdictional defect in the order, or;
2. there is a typographical or other clerical error in the order which has a



bearing on the decision or where the order does not express the manifest intention of the decision maker.

An order should not be reconsidered simply on the basis that new evidence is provided, whether or not that evidence was obtained at the time of the inquiry.

- In this case, the Commission did reconsider an earlier decision in P-612. (**Order #P-892**)
- Third parties were granted reconsideration where they were not originally notified. Consequently a new Notice of Inquiry was sent to the institution and parties involved for representations. (**Order #M-510**)

ss.(2)

- The Commissioner has the power to order the head to exercise his or her discretion in respect of exemptions. Where the head has not properly considered all the factors, the Commissioner may order the head to reconsider his or her exercise of discretion. Institutions that do not provide the factors that were considered in the exercise of discretion can be ordered to do so. However, the Commission may not interfere with the head's exercise of discretion providing it was properly applied. (**Orders #52, 56, 58, 92, 135, 141, 162, 163, 200, 203, 210, P-211, P-220, P-403, P-413, M-71, M-101, M-285, M-286, M-297, M-298, M-299, M-370**)
- In this case, the Commission ordered the institution to provide further representations as to its exercise of discretion where the records dealt with in the closed meeting had been published in the newspaper. The Commission ruled that the fact of publication was a fundamental factor to be considered in the exercise of discretion and it was not apparent that the institution had considered this factor in claiming the exemption. (**Order #M-273**)
- The Commission has the duty to review the decision of an institution to claim a discretionary exemption by determining whether the record falls within the discretionary exemption. (**Order #M-59**)
- Where the head has exercised discretion, the Commissioner will look very carefully at the manner in which it was done to ensure that it was accomplished in accordance with established legal principles. (**Orders #200, P-241**)
- Where there was nothing to indicate that the discretion was exercised improperly, the head's decision will not be disturbed on appeal. (**Order #154**)
- Where the head was found to have not exercised the discretion properly, he or she was ordered to reconsider the exercise of the discretion and to provide written reasons. (**Orders #170, 195, 199, P-262**)



- The Commission found that the institution had not properly exercised its discretion when it refused to disclose a handwritten note to a requester in circumstances where the requester had already received a typewritten version that was essentially the same from the institution. The institution was ordered to reconsider the exercise of its discretion. **(Order #P-403)**
- Where the decision-making of a delegated head could be perceived as a conflict of interest, the Commissioner may order the statutory head (or another person or body specifically delegated by the statutory head) to reconsider the exercise of discretion. **(Order #M-457)**
- In this case the records, a legal opinion and background reports and correspondence, were between 14 and 21 years old. Given the age of the records the Commission looked very carefully at the head's reasons for deciding to withhold the documents. It found that since litigation was still pending and the issues remained controversial, the exercise of discretion was appropriate **(Order #P-944)**

ss.(3)

- This provision does not authorize the Commission to make an order as to costs. This provision must be read in conjunction with s.52(1) [FIPPA] \ s.41(1) [MFIPPA] which allows the Commission to review decisions of the head. As a result, the terms and conditions that may be imposed under this provision must be read in that light. **(Order #P-604, P-724)**
- Where no salary range existed, the Commission ordered an institution to create a salary range that was reasonable and to disclose it to the requester. **(Orders #M-18, M-102)**
- The Commissioner has no power to order that an institution create a record where there is no duty to do so. However, it may in certain circumstances be in keeping with the spirit and purpose of the Act for an institution to create a record. **(Orders #99, and see #17, #19 and #196) (See Order #M-18, where the institution was ordered to create a record disclosing the salary range of an employee.)**
- In this case, the institution did not provide a decision to the appellant regarding access to certain records. As a result, the institution was ordered to comply with the requirements of the Act and to issue a decision regarding access to the records. **(Order #P-451)**
- In this case, since the institution gave no information as to how the fee estimates were arrived at, the institution was ordered to prepare the records in response to the requests without charging any fee for searching and preparing the records. **(Order #P-430)**
- In this case the Commission referred the matter to the Compliance Branch to deal with an alleged privacy breach. **(Order #M-510)**



- The Commission has the power to order an institution to provide the appellant with a decision letter regarding the appellant's request for records. In this case the ministry did not respond within the 30 days prescribed by the Act , did not request a time extension to process the request and did not issue a decision letter. (**Order #P-958**)
- The Commission may order an institution to provide an appellant with a decision letter within 15 days of the Order. (**Order #P-958**)
- In this case a ministry which did not respond to a request involving approximately 4000 pages of records within the time frame of the Act was ordered to do so within 15 days of the Order without recourse to a time extension. (**Order #P-951**)
- Where a request for access is frivolous, vexatious and constitutes an abuse of process, the Commissioner may impose conditions on the processing of the requester's requests and appeals. The conditions imposed in this case were to limit the number of requests during a specified time period; thereby, negating the requirement for a head to comply with (a) and (b) of this section within 30 days of receiving the request (**Order #M-618**).







## FIPPA

### s.55 CONFIDENTIALITY

(1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

#### NOT COMPELLABLE WITNESS

(2) The Commissioner or any person acting on behalf of or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act.

#### PROCEEDINGS PRIVILEGED

(3) No proceeding lies against the Commissioner or against any person acting on behalf of or under the direction of the Commissioner for anything done, reported or said in good faith in the course of the exercise or performance or intended exercise or performance of a power, duty or function under this or any other Act.

## MFIPPA

No comparable section







## s.55(1)

- The reference in this section to "any other Act" includes appeals filed under the municipal freedom of information legislation. Consequently, the Commission was precluded from providing records in the appeal to a third party's counsel. Third parties in these circumstances may make a request to the institution involved in the appeal for the records sought. Moreover the Commission noted that it has no obligation to provide it prior decisions to parties to an appeal. These were available in the Ontario Government Bookstore. (Order #M-430)







DELEGATION BY  
COMMISSIONER

56. (1) The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation.

EXCEPTION RE RECORDS  
UNDER S. 12 OR 14

(2) The Commissioner shall not delegate to a person other than an assistant commissioner his or her power to require a record referred to in section 12 or 14 to be produced and examined.

DELEGATION

The Commissioner shall not delegate to a person other than an Assistant Commissioner his or her power to require a record referred to in section 8 to be produced and examined.







PART V/PART IV

GENERAL

FIPPA

s.57

MFIPPA

s.45

COSTS

(1) Where [FIPPA] \ If [MFIPPA] no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record to pay,

- (a) a search charge for every hour of manual search required in excess of two hours to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record; and
- (d) shipping costs.

EXCEPTION, PERSONAL INFORMATION

(2) Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information.

ESTIMATE OF COSTS

(3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over \$25.

WAIVER OF PAYMENT

(4) A head shall waive the payment of all or any part of an amount required to be paid under this Act where [FIPPA] \ if [MFIPPA], in the head's opinion, it is fair and equitable to do so after considering,

- (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
- (b) whether the payment will cause a financial hardship for the person requesting the record;
- (c) whether dissemination of the record will benefit public health or safety; and



(d) any other matter prescribed in the regulations.

#### REVIEW

(5) A person who is required to pay a fee under subsection (1) may ask the Commissioner to review the amount of the fee or the head's decision not to waive the fee.

#### DISPOSITION OF PAYMENTS

(6) The costs provided in this section shall be paid and distributed in the manner prescribed in the regulations.



## GENERAL

FIPPA

s.57

## SUMMARY OF ORDERS/PRIVACY REPORTS

MFIPPA

s.45

## General

- The Act does not mandate a requirement on the part of institutions to keep records in such a way as to be able to accommodate any of the myriad of ways in which a request for information might be framed. As a result, it is appropriate for institutions to bill requesters for search time required because the filing system was not made to contemplate the types of records requested. However, it is wise for an institution to reassess the manner in which it maintains its records so that they may be retrieved more easily and at a minimal cost. (**Orders #31, M-166, M-203, M-372, M-549, M-583**)
- The legislative intention to include a "user-pay" principle in the Act is clear. (**Orders #6, 67, 111, 184, 185, P-264, P-265**)
- This section adopts a "user pay" principle. The fact that an institution has not previously charged for similar information does not have a bearing on its decision to charge fees in subsequent situations. (**Order # M-538**)
- It is "extravagant" to suggest that the amount of fees could operate as a constitutional breach (e.g., breaching the right to "freedom of the press"). (**Orders #4, 5**)
- This section adopts a "user pay" principle. Even though the manner in which an institution files its records may not be the most efficient, the Act does not require an institution to keep records in such a way as to accommodate the various ways in which a request for information might be framed. (**Order #M-546**)
- Where the Commission has issued an Order that an exemption claimed by an institution does not apply, the institution may charge fees under the Act to the requester for access to those records. From the perspective of the access system as a whole, a decision that a government organization must issue a fee estimate in situations where it reasonably believes that the records to which the request will be withheld from disclosure would not facilitate the efficient processing of access requests. As a result, where an institution has decided not to disclose records that are subject to an access request and the Commissioner's office subsequently orders that these records be disclosed, the institution has the right to require that the appellant pay the requisite fee before releasing the records. In these situations, the institution would not be required to disclose the records until the payment was received or the reasonableness of the amount charged is resolved in a subsequent appeal. (**Order M-372**)



- Even though disclosure of trustee expenses was necessary to ensure public accountability of trustees, where a board of education showed that it worked constructively with a requester to provide access to records, and where the institution offered the requester alternative methods to access requested information to reduce costs, and where costs were properly explained to the requester, the fee estimate provided by the institution was upheld on appeal. **(Order # M-538)**

ss.(1)

- The introductory part of this section was amended on January 1, 1991. At that time the word "may" was deleted and the word "shall" substituted. Requests made prior to January 1, 1991, are dealt with under the former wording. **(Orders #P-260, P-264, P-265)**
- Under the former wording of this provision, the head had the discretion to charge or not charge a fee irrespective of the consideration of a fee waiver. **(Orders #4, 6, 7, 31, 55)**  
**(NB: These Orders were made under the previous wording of this provision where the charging of fees was discretionary.)**
- If a record is severed, it is appropriate that a requester pay the photocopying costs to view the record. **(Order #2, P-425, M-163, M-171)**
- The maximum that can be charged for photocopying one page is 20 cents and this includes the employee cost of feeding the machine. **(Orders #184, 185, 260, P-490, M-163, M-390, M-576)**
- Copying charges could be levied where the requester has chosen pages of the original that he or she wishes copied. **(Orders #6, 67)**
- The institution's decision to charge costs for shipping within the province in order for the requester to view a record was upheld. If photocopies are required, applicable charges are allowable. The costs of preparing the record are allowable. **(Order #67)**
- Regarding the calculation of fees, when the institution provided an affidavit detailing the search time and the appellant provided no representations, the fee for search was upheld. **(Order #M-509)**
- The Commission authorized a fee estimate based on an estimate that two hours of search time would be necessary beyond the two free hours of search. The institution estimated there would be 31 inches of records to search through.**(Order # P-938)**
- Where an institution merely asserts the hour spent without explanation as to what they were spent on in relation to the Act, the Commission may order the institution to provide the records without a fee. **(Order #M-591)**
- The introductory words of this section do not, because of s.207(4) of the Education Act,



allow a requester to examine the expense accounts of certain school board officials, or the vouchers, invoices or other background documents used to prepare an audited annual financial report, free of charge. The Education Act provided for disclosure of the "minute book, current accounts, and the audited annual financial report," which include statements of finances, free of charge; expense accounts are not included in the items listed. As a result, the fee schedule in FIPPA\MFIPPA applied to the records. (**Orders #M-166, M-171**)

ss.(1)(a)

- An institution may satisfy the Commission that a fee estimate was appropriate by making detailed representations as to how its record holdings were kept and as to the impact of a reorganization that had recently taken place. Institutions may satisfy the Commission that the fees were appropriate by providing an affidavit to establish this. (**Orders #P-530, M-360, M-376, P-741, M-408, M-410, M-538**)
- This provision requires that institutions provide information regarding where the search took place, how much time was taken to review each file, the volume of records that were involved, whether the "search" time was actually the time expended to "create" the record ultimately produced and other circumstances that would enable the Commission to determine whether the fee is in accordance with this section. (**Orders #P-409, P-462, P-491, M-163, P-700, P-696, M-591, P-938**)
- Preparing an index is not chargeable as search time. As the Commission noted in its publication, "IPC Practices," an index should be included in an institution's decision letter. The time spent preparing an index is a necessary part of an institution's obligations in administering the Act. (**Order #P-741**)
- An institution may not charge for any time expended by an experienced staff person to review the results of a search conducted by a temporary individual hired specifically to conduct a search. (**Order #P-260, P-943**)
- Where no indication is made by the institution that the search time is in excess of the two hours free search time, it will be assumed that the total time includes the two hours that are free. (**Order #P-264**)
- Where an institution does not provide the Commissioner with evidence of the details of the search time, the fee charged may be disallowed. (**Orders #P-248, P-438, M-591**)
- Search time does not include time spent photocopying the records. (**Order #M-301**)
- Search time does not include the time it takes an employee to walk from one area in the institution to another to locate responsive records. (**Order #M-372**)
- The time to drive to an off-site storage to retrieve records cannot properly be described as



time to conduct a manual search, nor can it be characterized as time to prepare a record for disclosure. Unless these costs are invoiced, they cannot be part of the cost assessment. (**Orders #M-171, M-337**)

- Examining ledger-sized binders of computer sheets to determine whether particular sheets are responsive to a request should be calculated as search time rather than preparation time because it involves locating and identifying information responsive to a request. (**Order #M-546**)
- Time spent disassembling binders for photocopying purposes may be included in preparation time charges. However, an institution is not allowed to charge for "interruption time" - that is, for time that individuals who are processing the request will require to attend to other matters. An institution may only charge for time spent actually processing a request. (**Order #M-546**)

ss.(1)(b)

- The time spent in making a decision as to the application of an exemption should not be included when calculating fees relating to preparation of a record for disclosure. It is also improper to include time spent for transporting records to a mail room or arranging a courier service. The clause should be interpreted narrowly. (**Orders #4, 105, P-264, M-376, M-408, M-562**)
- Where only a few severances per page are made, two minutes of preparation time per page is reasonable. (**Orders #184, P-260, P-565**)
- Preparation time does not include the costs of locating the records responsive to the request and removing them from one office to another. Where the institution has not determined whether the requested records exist, the fee estimates provided cannot be established. (**Order #M-168**)
- In this case the institution had the capability of producing photographs in-house and therefore could not pass the costs of the production of the photograph on to the requester by invoice. The Commission ruled that the only costs that could be passed on were those involved in preparing the record for disclosure. The Commission found that the fact that there is no specific rate in the Regulation for the reproduction of photographs did not preclude the institution from charging a fee for this service. (**Order #M-236**)
- Preparation time does not include the time taken to actually photocopy a record. Twenty cents per page is the maximum amount that may be charged for photocopying and this includes the cost of an individual 'feeding the machine.' In addition, preparation in this section should be read narrowly and it should not include removing staples and paperclips, copying the relevant pages and putting them back to the books where they originated. Nor should packaging records for shipment, transporting records to the mail



room or arranging for courier service be included. However, where special preparation is necessary, such as where maps have to be taped together or where records have to be removed from cerlox bound volumes, fees for preparation may be appropriate. (**Orders #M-301, P-490, P-608, 4, M-360, M-372**)

- Where 2.5 years of an employee's expense claim records were requested, an institution used a 2 month sample to calculate preparation (severing) costs. The institution also indicated that any costs actually incurred above the estimate would be waived, but that if the costs were less, only the actual costs would be charged. The Commissioner held that the estimate was properly calculated even though some pages may not in fact require any severing at all. (**Order #M-538**)

ss.(1)(c)

- Where an institution submits that a specific fee is for "reproduction," it must substantiate that fee. If it is for copies, then the institution must indicate the number of estimated pages, or the rate at which the fee is calculated. Sufficient facts and evidence must be provided to enable the Commission to review the costs. (**Order #M-103, M-163**)
- Where 2.5 years of an employee's expense claim records were requested, the institution used a 3 month sample from the requested period to estimate copying costs. The institution also indicated that once the copying was completed, the requester would only be billed for the actual cost to a maximum of the amount estimated. The Commissioner found the estimate was properly calculated. (**Order #M-538**)

ss.(1)(c) and (d)

- Preparation and shipping charges can be appropriate if the requester seeks access to records at an off-site location. (**Orders #6, 7, 8, 67, P-741**)
- The fact that a requester lives outside of the municipality where the records are located should be a relevant factor in the head's exercise of discretion under s.57(1). Shipping charges were appropriate. (**Order #8**)
- Shipping charges may also be charged to send records to the requester. (**Order #P-741**)

ss.(2)

- The reference in this section to "individual" means a natural person. Had the Legislature intended that this provision apply to a corporate entity, even where the information pertaining to the business entity may be personal information, then it would have to have made this clear. As a result, a corporation would not receive personal information under the Act free of charge. (**Order #P-741**)
- Information in a report that affects only the interests of an individual is not personal information where no identifiable information referable to that individual is included in



the report. As a result, fees may be charged. (**Order #P-245**)

- In view of this provision, an institution cannot charge a requester for access to personal information, even when the requester had several of the records in his/her possession prior to making the request. (**Order #P-233**)
- Any information which relates directly or indirectly to an individual or a matter which involves the individual could be considered personal information for the purposes of a request and for determining fees. Thus where the police were asked for all information related to a charge laid against an individual, all the information kept in this regard is the individual's personal information even where some of the pages only indirectly relate to the individual or his or her matter. (**Order #M-514, P-943**)
- In this section, access to personal information should be interpreted as access to records as opposed to pages of records containing personal information. An institution was ordered not to charge a fee for the fourth page of a four page letter even though that page did not contain a reference to the individual. (**Order #M-514**)

ss.(3)

- Fee estimates should be reasonable and, for complex requests, should be based on a representative sampling of records, or on advice of experienced employees knowledgeable about the records. (**Orders #81, 86, 132**)
- Fee estimates should contain a reference to the fee waiver provisions of ss.57(4) [MFIPPA ss.45(4)]. (**Orders #81, 86**)
- Issuance of a fee estimate suspends the 30-day count until the deposit is received or fees are waived. (**Orders #81, 86**)
- Where responsive records have been identified for an appeal, the institution may be ordered to make a final access decision on the records determined to be responsive in the Order, without recourse to a time extension. (**Order #M-514**)
- In this case, the institution provided the Commission with an affidavit as the basis for the fee estimate to confirm how the search was done. (**Order #M-163**)

ss.(4)

#### General

- The party seeking a fee waiver bears the burden of establishing his or her case. By simply providing present and projected earnings, an inmate in a place of detention does not discharge the burden of proof. (**Orders #4, 10, 31, 95, 111, 105, 117, P-264, P-265,**



P-366, P-425, P-463, M-66, P-530, M-218, P-591, M-220, M-228, M-229, P-608, P-698, M-360, P-741)

- When the appellant did not provide representations regarding the justification for a fee waiver, it was found that the granting of a waiver would shift an unreasonable burden of the cost of access from the appellant to the institution. **(Order #M-509)**
- The section is an exhaustive list of the matters to be considered in determining if a waiver is appropriate. The "public interest" is not one of the factors to be considered. **(Orders #5, 6, 10, 31, 43, 55, 81, 111, P-700)**
- The status of a requester as a Member of the Legislative Assembly is not a factor which must be considered in determining whether it is fair and equitable to waive a fee respecting an access request. The Act did not recognize this special status as a criteria for the waiver of fees. **(Order #P-608)**
- The requester must raise the matter of a fee waiver. However, a request for a waiver need not be explicit. **(Orders #4, 5, 10, 30)**
- A fee waiver was granted in respect of a request for access to all records relating to a County's waste management master plan and a landfill site search. The Commission was satisfied that the request involved a matter of public interest and related to a public health and safety issue. It was also determined that the request was fair and equitable in that the requester had attempted to limit the request by restricting the time period and by offering to view the records at the consultant's office. **(Order #M-408)**

#### "In the Head's Opinion"

- The phrase "in the head's opinion" does not mean that the Commissioner does not have the power to review an institution's decision not to waive a fee. The Commission may confirm or overturn the decision based on whether it is correct given the criteria in subsection (4) and the provisions of the Act dealing with the Commission's powers. **(Orders #P-474, M-166, P-526, P-530, P-566, M-177, P-591, M-220, M-228, M-229, P-608, M-252, P-741, P-754, M-408, M-411, M-417, M-429)**

#### "Fair and Equitable"

- To determine whether a fee estimate is fair and equitable the following factors are relevant: 1. the manner in which the institution attempted to respond to the appellant's request; 2. whether the institution worked with the appellant to narrow and/or clarify the request; 3. whether the institution provided any documentation to the appellant free of charge; 4. whether the appellant worked constructively with the institution to narrow the scope of the request; 5. whether the request involves a large number of records; 6. whether or not the appellant has advanced a compromise solution which would reduce



costs, and 7. whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution, such that there would be significant interference with the operations of the institution. (**Orders #P-741, M-408, M-417**)

- The fee estimate established by an institution for access to the expense accounts of certain school board officials was not waived in this case. The Commission decided that it would not be "fair and equitable" to waive the fee based on the following considerations: 1. the institution responded in good faith to the requester; 2. the request involves a very large volume of records; 3. the requester was not prepared to narrow the request but insisted on receiving raw data which required extensive searches and time consuming severance procedures; 4. the requester had not advanced a compromise solution to reduce costs; 5. the actual cost of producing the record exceeds the fee estimate itself and the waiving of the fee would shift an unreasonable burden of the cost of access from the appellant to the Board, resulting in significant interference with the operations of the board. (**Orders #M-166, M-171, P-698**)
- In considering whether a fee waiver would be fair and equitable, the Commission noted in this case that the original request was massive both in terms of the subject areas addressed and the time periods over which information was sought. The requester only narrowed the request minimally and did not, in the Commission's view, work constructively with the institution to meaningfully narrow the scope of the request. In the result, a fee waiver was not authorized. (**Orders #M-220, P-698**)
- The Commission determined that it was not "fair and equitable" to waive a fee of \$690 plus any photocopying costs regarding an access request for expense account records as well as salary and other payments made to two trustees. Even though the payment could result in financial hardship to the requester, the Commission found that it would shift an unreasonable burden of the cost of processing the appeal from the requester to the institution. The Commission held that the Act was designed to operate on a user-pay principle whereby requesters are expected to pay the cost of searching for information sought. (**Order #M-417**)

**ss.(4)(b)**

- In requesting a fee waiver, the requester bears the burden of providing the institution with adequate information concerning his or her financial position, including assets, income, expenses. Where the requester simply states that he or she is on welfare assistance and that he or she has child support payments to make, this is not adequate. The institution and the Commission must have detailed information concerning assets and expenses in support of a fee waiver. (**Orders #4, 10, 105, 111, 184, 185, P-425, P-463, P-566, M-252**)
- The appellant provided evidence that he has a modest income and that he is the sole supporter of two dependents. As a result, the Commission agreed that an expenditure of about \$1,500 to obtain the records regarding an aboriginal land claim would cause financial hardship to the appellant. The Commission considered that the institution had



provided the appellant with 1,300 pages of general records free of charge when it could have charged a fee. As well, officials of the institution spent many hours talking to the appellant about narrowing the request to reduce the fees. In the result, the Commission determined that the institution's decision not to waive the fee was based on fair and equitable grounds. The institution's decision was upheld. (**Order #P-463**)

- In this case, the Commission decided that a payment of \$76.50 would not cause financial hardship to the requester. The Commission considered that the institution had already reduced the fee in consideration of the requester's financial position, that the actual cost of processing the records exceeded the initial fee estimate and that the institution must balance the obligation to provide access to information with the responsibility to manage public funds wisely. (**Order #M-177**)
- A rural citizens' group involved in waste management and disposal issues sought a waiver of a fee of \$437.20 regarding records about a landfill site. The Commission ruled that the waiver should be not be granted. It found that in this case there was not sufficient evidence of financial hardship to warrant shifting the financial burden from the requester to the government and ultimately to the public. The financial resources available to the requester at the time of the access request was a significant factor to consider. In this case the funds in the bank were sufficient to cover the costs of processing the request. (**Order #P-526**)
- In this case, the financial statement provided by the requester in support of a fee waiver was held by the Commission to be inadequate. It did not contain sufficient information/evidence to support a claim for a fee waiver under this section. As a result, the institution's decision not to waive the fee was upheld. (**Order #P-530**)
- The financial resources of a community group that sought certain environmental information were not relevant to this analysis; rather, the financial resources of the individuals comprising the group were required to make the determination under this provision. (**Order #P-698**)
- Non-profit organizations do not automatically qualify for a fee waiver based on financial hardship. (**Order #111**)

ss.(4)(c)

- The following factors are relevant to the determination as to whether this provision is satisfied: 1. whether the subject matter of the record is a matter of public rather than private interest; 2. whether the subject matter of the record relates directly to a public health or safety issue; 3. whether the dissemination of the record would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue; 4. the probability that the requester will disseminate the contents of the record. In this case, the appellant was seeking records that were considered for inclusion in the rehabilitation plans for a nuclear generating plant, which were subsequently rejected. The Commission



found that the institution should have waived the fee under this provision. It found that the safety of the nuclear generating facilities was a matter of considerable importance to the general public and that the matters dealt directly with public health and safety. The Commission found that the dissemination of the records would be to the public at large and that this would contribute to the development of public understanding regarding the maintenance of aging nuclear reactors. In deciding to interfere with the head's decision, the Commission considered the fact that the appellant narrowed the request with the result that the original fee estimate was reduced by 90%. (**Orders #P-474, P-463, P-608, M-252, P-698, M-356, M-372, P-760, M-403, M-404, M-408, M-411**)

- This provision is discretionary. A waiver is not required if the record contains some information relating to health or safety matters. (**Orders #2, P-473**)
- This provision requires that there be a **public** benefit resulting from the disclosure of the record in order for the waiver provision to apply. (**Order #M-66**)
- Statistical records relating to complaints received by the Psychiatric Patient Advocate Office from current or former patients of Queen Street Mental Health Centre that allege physical or sexual abuse by staff were disclosed without fee in this case. The institution had granted access to certain records and requested the payment of \$147 for the remainder of the records. The patients' council which requested the information stated that it intended to publish the information in a newsletter. The Commission held that the care and safety of vulnerable persons is a public responsibility and of public concern and that the records related directly to public health and safety. (**Order #P-754**)
- While records related to the number of Workers' Compensation Board claims related to the use of video display terminals were of public interest, the Commission found that insufficient evidence was provided that the dissemination of the records would yield a public benefit. It was noted that the issue was already debated publicly and that a number of studies had been done on the subject. Consequently, the waiver of the fees was denied. (**Order #M-403**)
- In this case the Commission did not believe that a waiver applied regarding access to records concerning the environmental condition of the site of the new Ministry of Natural Resources offices in Peterborough. The disclosure of the record would not yield a public benefit because it would neither disclose a public health concern nor contribute to the development of understanding of an important public health issue. (**Order #P-608**)
- In a very broad request where the responsive records have not yet been retrieved and their contents cannot be ascertained with any degree of specificity, it is not reasonable to conclude that the dissemination of the records would benefit public health or safety. The mere fact that the responsive records may contain some information in some way relating to health or safety matters is not sufficient to warrant a fee waiver under this provision. (**Order #P-425**)



- In this case, the Commission was not satisfied that dissemination of information concerning chemical spills would contribute meaningfully to the development of understanding of an important health and safety issue. The requester did not supply any evidence respecting his intention or ability to disseminate the records and the Commission was not satisfied that these particular records would be disseminated to the public. (**Order #M-252**)

s.57(5)

- The burden of establishing the reasonableness of the estimate rests with the institution. The institution discharges this burden by providing detailed information as to how the fee estimate has been calculated and by producing sufficient evidence to support its claim. (**Orders #86, P-425, M-103, M-139, M-171, M-301, M-337, M-376, P-741, M-408, M-410, M-411**)
- One of the ways that an institution may discharge its onus to establish the reasonableness of the search is to provide an affidavit which outlines the steps taken to calculate the search and preparation time, the charges for same and the photocopying costs that comprise the fee estimate. (**Order #M-337**)







ANNUAL REPORT  
OF COMMISSIONER

(1) The Commissioner shall make an annual report, in accordance with subsection (2), to the Speaker of the Assembly who shall cause the report to be laid before the Assembly if it is in session or, if not, at the next session.

CONTENTS OF REPORT

(2) A report made under subsection (1) shall provide a comprehensive review of the effectiveness of this Act and the *Municipal Freedom of Information and Protection of Privacy Act* in providing access to information and protection of personal privacy including,

- (a) a summary of the nature and ultimate resolutions of appeals carried out under subsection 50(1) of this Act and under subsection 39(1) of the *Municipal Freedom of Information and Protection of Privacy Act*;
- (b) an assessment of the extent to which institutions are complying with this Act and the *Municipal Freedom of Information and Protection of Privacy Act*; and
- (c) the Commissioner's recommendations with respect to the practices of



p a r t i c u l a r  
institutions and  
with respect to  
proposed revisions  
to this Act, the  
*Municipal Freedom of  
Information and  
Protection of  
Privacy Act* and the  
regulations under  
them.



The Commissioner may,

- |   |   |
|---|---|
| <p>(a) offer comment on the privacy protection implications of proposed legislative schemes or government programs;</p> <p>(b) after hearing the head, order an institution to,</p> <p style="padding-left: 40px;">(i) cease a collection practice, and</p> <p style="padding-left: 40px;">(ii) destroy collections of personal information,</p> <p style="padding-left: 40px;">that contravene this Act;</p> | <p>(a) offer comment on the privacy protection implications of proposed programs of institutions;</p> <p>(i) cease a collection practice that contravenes this Act, and</p> <p>(ii) destroy collections of personal information that contravene this Act;</p> |
|---|---|
- (c) in appropriate circumstances, authorize the collection of personal information otherwise than directly from the individual;
- (d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;
- (e) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities; and
- (f) receive representations from the public concerning the operation of this Act.







ss.(b)(ii)

- Where evidence of an improper collection of personal information arises out of a review into a privacy complaint, the Commissioner may recommend that the improperly collected personal information be destroyed. (**Privacy Investigation Report #I90-04**)
- Where a requester who seeks information orally is told that access is denied, he or she should also be advised in writing of the right to make a written request under the Act. (**Privacy Investigation Report #I89-59**)







The Lieutenant Governor in Council may make regulations,

- (a) respecting the procedures for access to original records under section 30 (FIPPA)/23 (MFIPPA);
- (b) respecting the procedures for access to personal information under subsection 48(3);
- (c)/(b) prescribing the circumstances under which records capable of being produced from machine readable records are not included in the definition of "record" for the purposes of this Act;
- (d)/(c) setting standards for and requiring administrative, technical and physical safeguards to ensure the security and confidentiality of records and personal information under the control of institutions;
- (e)/(d) setting standards for the accuracy and completeness of personal information that is under the control of an institution;
- (f)/(e) prescribing time periods for the purposes of subsection 40(1) (FIPPA)/30(1) (MFIPPA);
- (g)/(f) prescribing the payment and allocation of fees received under section 57 (FIPPA)/45 (MFIPPA);
- (h)/(g) prescribing matters to be considered in determining whether to waive all or part of the costs required under section 57 (FIPPA)/45 (MFIPPA);
- (i) designating any agency, board, commission, corporation or other body as an institution and designating a head for each such institution;
- (h) designating any agency, board, commission, corporation or other body as an institution;
- (i) prescribing circumstances under which the notice under subsection 29(2) is



not required;

- (j) prescribing conditions relating to the security and confidentiality of records used for a research purpose;
- (k) prescribing forms and providing for their use;
- (l) respecting any matter the Lieutenant Governor in Council considers necessary to carry out effectively the purposes of this Act.



(1) No person shall,

- (a) wilfully disclose personal information in contravention of this Act;
- (b) wilfully maintain a personal information bank that contravenes this Act;
- (c) make a request under this Act for access to or correction of personal information under false pretences;
- (d) wilfully obstruct the Commissioner in the performance of his or her functions under this Act;
- (e) wilfully make a false statement to, mislead or attempt to mislead the Commissioner in the performance of his or her functions under this Act; or
- (f) wilfully fail to comply with an order of the Commissioner.

PENALTY

(2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine not exceeding \$5,000.

CONSENT OF ATTORNEY GENERAL

(3) A prosecution shall not be commenced under clause (1) (d), (e) or (f) without the consent of the Attorney General.







(1) A head may in writing delegate a power or duty granted or vested in the head

to an officer or officers of  
the institution

to an officer or officers of  
the institution or another  
institution

subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

#### PROTECTION FROM CIVIL PROCEEDING

(2) No action or other proceeding lies against a head, or against a person acting on behalf or under the direction of the head, for damages resulting from the disclosure or non-disclosure in good faith of a record or any part of a record under this Act, or from the failure to give a notice required under this Act if reasonable care is taken to give the required notice.

#### VICARIOUS LIABILITY OF CROWN PRESERVED

(3) Subsection (2) does not by reason of subsections 5 (2) and (4) of the *Proceedings Against the Crown Act* relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (2) to which it would otherwise be subject, and the Crown is liable under the Act for any such tort in a like manner as if subsection (2) had not been enacted.

#### VICARIOUS LIABILITY OF CERTAIN INSTITUTIONS PRESERVED

(4) Subsection (2) does not relieve an institution of liability in respect of a tort committed by a person mentioned in subsection (2) to which it would otherwise be subject and the institution is liable for any such tort in a like manner as if subsection (2) had not been enacted

#### VICARIOUS LIABILITY OF INSTITUTIONS PRESERVED

(3) Subsection (2) does not relieve an institution from liability in respect of a tort committed by a head or a person mentioned in subsection (2) to which it would otherwise be subject and the institution is liable for any such tort in a like manner as if subsection (2) had not been enacted.







ss.(1)

- A delegation of authority from a previous head continues to be effective even after a new head has taken over. As well, a delegation that does not refer to named individuals is valid. Delegations vest authority in the holder of the office and not the individuals who may occupy the office at any given time. (**Orders #P-237, P-244**)
- A delegation that permits decision makers to "grant access" but not to "deny access" is not sufficient authority to allow the individual with delegated powers to claim an exemption. As a result, the institution had not given proper notice under s.26 [FIPPA] \s.19 [MFIPPA] and was deemed to have refused access to the records under s.29(4) [FIPPA]\s.22(4) [MFIPPA]. (**Order #P-333**)
- A delegation that authorized certain staff to grant access to records in part and to apply the exemptions in the Act was sufficient to allow the staff to not disclose one document where other documents are disclosed. This constitutes a decision to provide partial access which is within the delegation. (**Order #P-664**)
- Serious defects in a delegation are only grounds for review if they are mandatory within the statutory scheme or if the defects can be shown to result in substantial prejudice. In this case, the Minister's use of the popular term for the position of Chairman of the Ontario Human Rights Commission; namely, "Chief Commissioner" in his delegation of authority is not serious enough to render the delegation ineffective. (**Order #P-221**)
- The power to withhold records provided or produced during an inquiry (s.52(9) [FIPPA] \ s.41(9) [MFIPPA]) need not be referenced in the delegation of authority under s.62(1) [FIPPA] \ s.49(1) [MFIPPA]. (**Order #P-586**)
- The delegation of authority ought to contemplate the possibility of conflict of interest and provide for alternate decision-makers in those situations. (**Order #M-262**)
- Where an institution's head instructed the institution's counsel to sign letters in response to a request on his or her behalf, the letters were properly signed and the decisions properly made. (**Order #P-775**)
- The Act requires access decisions to be made by heads of institutions, or their delegates, and does not authorize delegations of this power to anyone other than an officer or officers of the same institution or another body which qualifies as an institution under the Act. (**Order #M-408**)







FIPPA

s.63

ORAL REQUESTS

MFIPPA

s.50

(1) Where (FIPPA)/If (MFIPPA) a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request.

PRE-EXISTING ACCESS PRESERVED

(2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force [FIPPA] \ the 1st day of January, 1991 [MFIPPA].







## ss.(1)

- In order for it to be determined that access has been provided under the Act in the absence of a request, the notice procedures of the Act and the exemptions would have to have been observed. (**Order #P-274**)
- Access under the Act has not been given where an official from an institution allows an individual to read a record. In this case the institution allowed the individual to read a complaint letter, and later refused the individual access to the letter in response to an access request. The intention of the institution is an important factor in determining whether access under the Act has been provided. One essential element of intention is whether the institution considered the notice requirements of the Act when the individual was allowed to read the documents. In order to be provided with access for the purposes of the Act, there must be some evidence that the institution has treated the matter as coming under the provisions of the Act. (**Orders #162, M-180, P-274**)
- It was the Commission's view that this section was designed to promote the routine disclosure of information **other than** personal information. (**Privacy Investigation Report I93-022M**)
- The Commission in a Postscript stated that all government organizations ought to make expenditure related information available to the public. This should include information about expenses incurred by officials that are reimbursed by the institution. Institutions should find ways of providing access to this information that is inexpensive and expeditious. (**Order #M-583**)

## ss.(2)

- Pre-existing access must be by the public at large. Access to records by the parties to an action does not constitute access by the public at large. (**Order #178**)
- Even though plans and specifications of a maximum security facility were readily disclosed prior to the Act coming into force, this section does not operate to require that this practice continue. New procedures put in place for security reasons can operate to limit disclosure. (**Orders #187, P-217**)







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FIPPA

MFIPPA

s.64

CROWN PRIVILEGE/INFORMATION OTHERWISE AVAILABLE

s.51

(1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

POWERS OF COURTS AND TRIBUNALS

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.







## General

- Disclosure of records that are in the custody or control of an institution are governed by Ontario's access and privacy legislation. Where there is a conflict between the practice of a tribunal and the legislation, the legislation prevails. This section supports this view. (**Order #53**)
- The existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under this legislation is unfair. Had the legislators intended this legislation to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. The Commission referred to Playboy Enterprises Inc. v. Department of Justice [677 F.2d 931 (1982)], heard in the United States Court of Appeals, District of Columbia Circuit. In that case, decided under the U.S. freedom of information legislation, the government put forward the argument that, because its claim of privilege with respect to a certain record had been sustained in discovery proceedings in other cases, those determinations should be given weight in the decision as to whether the record should be released under the legislation. The Court however, ruled that the issues were dissimilar and that exemption from discovery did not mean exemption from disclosure under the freedom of information legislation. [Editorial Note: The Freedom of Information and Protection of Privacy Act does contain an override in respect of the Courts of Justice Act which would allow for non-disclosure of records under this scheme where a court has made such an order. (see s.67)] (**Orders #48, P-609**)
- The fact that access to information may be provided to an accused charged with a Highway Traffic Act offence by the prosecutor as part of pre-trial disclosure does not mean that access under this Act should be denied. This Act operates as independent legislation and, without explicit exclusion, access under this legislation may also be provided. (**Order #M-510**)
- The Commission observed that this section indicates that where access to records are denied under the Act, the information may be properly available on discovery or by subpoena. In this case, the Commission denied access to a record containing the blood alcohol level of an affected party killed in a car accident. This accident also resulted in the death of 2 members of the requester's family. The Commission found that the denial to the requester of the affected parties' blood alcohol level was consistent with the privacy provisions of the Act, particularly because the requester had alternative means to access the records. (**Order # P-945**)

ss.64(1)

- If an assessment matter proceeds to an appeal before the Assessment Review Board or the Ontario Municipal Board, each of these tribunals has the authority to order disclosure to an



appellant's counsel subject to an undertaking of confidentiality. The Commission has ruled that access provided under the Act constitutes disclosure to the public at large. (**Order #P-931**)



[Compare FIPPA, s.69]

(1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after the 1st day of January, 1991.

NON-APPLICATION OF ACT

(1) This Act does not apply to records placed in the Archives of Ontario by or on behalf of a person or organization other than an institution.

(2) This Act does not apply to records placed in the archives of an institution by or on behalf of a person or organization other than the institution.

(2) This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by section 1 of the Mental Health Act, where the record,

No comparable section

(a) is a clinical record as defined by subsection 35(1) of the Mental Health Act; or

(b) contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient.

(3) This Act does not apply to notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes are prepared for that person's personal use in connection with

No comparable section



the proceeding.

(4) This Act does not apply to anything contained in a judge's performance evaluation under section 51.11 of the Courts of Justice Act or to any information collected in connection with the evaluation.

(Courts of Justice Statute Law Amendment Act, 1994, s.49, to be proclaimed.)

(5) This Act does not apply to a record of the Ontario Judicial Council or of the Attorney General, if any of the following conditions apply:

1. The Judicial Council or its subcommittee has ordered that the record or information in the record not be disclosed or made public.

2. The Judicial Council has otherwise determined that the record is confidential.

3. The record was prepared in connection with a meeting or hearing of the Judicial Council that was not open to the public.

(Courts of Justice Statute Law Amendment Act, 1994, s.49, to be proclaimed.)

(6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person

(3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person



by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(7) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

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3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.







## s.65(2)

- The words "this Act does not apply" do not mean that the Commission does not have a role to play in the determination of whether records covered by this provision are outside of the legislation. Section 1(a)(iii) of the Act provides that one of the purposes of the Act is to provide a right of access to information in accordance with the principle that decisions on the disclosure of government information should be reviewed independently of government. While s.65(2) can apply only to the records that fall within the scope of that section, the legislature intended that the threshold issue of whether or not records fall within the scope of this provision be determined by the Commission. However, the Divisional Court held that any determination about whether a record is a 'clinical record' is reviewable on a standard of correctness. [The Court referred to Re Morgan et al. and Windsor RCSS Board (1979), 112 DLR (3d) 163 (Ont.Div.Ct.), Langlois v. Minister of Justice of Quebec (1984), 9 DLR (4th) 321 (SCC), Jacmain v. AG Canada (1977), 81 DLR (3d) 1 (SCC)] (**Order #P-623, affirmed by the Divisional Court in Ministry of Health v. Information and Privacy Commission, June 29, 1994.**)

## ss.(2)(a)

- This provision has two functions: to acknowledge the extra sensitivity of records related to psychiatric patients, and to recognize the separate access and privacy scheme for psychiatric patient records under the Mental Health Act. (**Orders #P-374, P-402**)
- Records contained in a clinical file of a patient in a psychiatric facility are "clinical records." (**Orders #P-215, P-775**)
- Daily assessment sheets used in Ministry of Health psychiatric facilities are "clinical records" under this subsection. In making this determination, the Commissioner referenced the Gould Medical Dictionary definition of clinical records, which stated that clinical records includes "forms used by a physician, clinic or hospital to record medical history, physical exams, lab findings, diagnoses and similar records." (**Privacy Investigation Reports #I90-48, 49, 50, 51, 52, 56**)
- In order for this provision to apply, it must be in respect of a psychiatric patient, and it must be a "clinical record" as defined in section 35(1) of the Mental Health Act. (**Orders #P-389, P-402**)
- The fact that a record discloses a name of a resident of a mental health centre does not mean that it is a "clinical record." Records that were not compiled in a psychiatric facility cannot



be classified as a "clinical record" as it is defined in the Mental Health Act. (**Orders #P-387, P-402**)

- Once clinical records are copied and provided to the Criminal Code Review Board for a different, non-clinical purpose, the appellant's annual review by the board, the records are no longer clinical records. The board is not part of the clinical team involved in the treatment of the appellant, rather its function is more custodial in nature and its control over these records is not for a clinical purpose. Similarly, records created by the board are not "clinical records." (**Orders #P-775, P-820**)
- The Commission found that tape recordings of hearings held by the Criminal Code Review Board which contained evidence presented by hospital staff concerning doctors' reports and the treatment and prognosis of a patient as referred to in this provision were not "clinical records" under this section. The evidence recorded on tape, consistent with Order P-775, was not tendered at the hearing for a clinical purpose. (**Order #P-820**)

**s.65(2)(b) [FIPPA]**

- This provision is distinct from s.65(2)(a) [FIPPA] and should be read restrictively, given the purposes of the Act. In order for a record to fall within the scope of this section it must contain the types of information listed in the section, it must be in respect of a psychiatric patient, and it must have a clinical purpose, nature or value. Records created by psychiatric patient advocates are not the type of records envisaged by this section. (**Orders #P-374, P-402, P-667**)
- In order to satisfy this provision, an institution must establish that the reason for having the records in its custody or control has a clinical purpose, nature or value. The fact that the original purpose was clinical does not necessarily mean that the reason it is kept by the institution at the time of the request is consistent with its original purpose. Clinical records maintained by a psychiatric facility lose their status as "clinical records" when they, or copies of them, leave the facility and are used by another institution for a different non-clinical purpose. (**Orders #P-389, P-402, P-775**)
- A copy of a clinical record that is kept in a ministry and not in the psychiatric facility where it was created is not a "clinical record" under s.65(2)(a). It is also not exempt under s.65(2)(b) in this instance because it has been removed from the clinical setting and is being maintained by the Ministry of Community and Social Services for a non-clinical purpose. (**Order #P-389**)
- Where the information was created by a policy analyst to inform the legal services branch of certain complaints regarding individual psychiatric patients, it has no clinical purpose and is not covered by this provision. (**Order #P-402**)



- The Commission ruled that a memorandum prepared by the Director of the Rehabilitation Unit at the Oak Ridge Division, Penetanguishene Mental Health Centre, for information purposes relating to litigation, did not have a clinical purpose or value even though it contained information about four patients at the centre and about programs in use at the facility. Similarly, records concerning discussions between counsel as to the relevance to the litigation of clinical records of a number of patients were also not covered by this provision since the records have no "clinical purpose, nature or value." (**Order #P-667**)

**s.65(3) [FIPPA]**

- Where a judge's notes are provided to another party, such as a police officer, they would cease to be employed for the personal use of the judge and would therefore not be covered by this section. (**Order #M-127**)







## FIPPA

s.66

## MFIPPA

s.54

### EXERCISE OF RIGHTS OF DECEASED, ETC., PERSONS

Any right or power conferred on an individual by this Act may be exercised,

- (a) where (FIPPA)/if (MFIPPA) the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;
- (b) by the individual's attorney under a continuing power of attorney, the individual's attorney under a validated power of attorney for personal care, the individual's guardian of the person, or the individual's guardian of property; and
- (c) where (FIPPA)/if (MFIPPA) the individual is less than sixteen years of age, by a person who has lawful custody of the individual.







## ss.(a)

- The term "personal representative" means an executor, an administrator or an administrator with the will annexed as defined in the Estates Administration Act. Evidence such as letters probate, letters of administration or ancillary letters probate under the seal of the proper court would have to be produced to establish this. (**Orders #P-294, M-205, M-206, M-243, P-679, M-384, M-400** and see also **M-50, M-51** where despite the fact that this section was not satisfied, the records were accessible in the balancing of factors under the personal information exemption. However, where the information is sensitive, it may not be disclosed in the weighing of factors. (**Order #P-679**) Where the records are subject to the presumed invasion provisions in the personal information exemption, the records may not be disclosed to a family member etc., see **Order M-283**)
- In order for the personal representative of a deceased to exercise a right or power of the deceased, the exercise of the right or power must relate to the administration of the estate. As a result, the rights of the representative are narrower than the rights of the deceased. The representative's rights include records relating to the financial matters of the estate to the extent that they are necessary to wind up the estate. In these cases, this provision did not entitle a representative to access sensitive personal information about allegations made against the deceased, which may have been relevant to determining potential causes of action for or against the estate. In **M-400** the Commission found that s.38 of the Trustee Act precluded an administrator from suing on behalf of a deceased's estate for the wrongful death of the deceased. Consequently, the Commission held that any damages that may result from a lawsuit would not form part of the assets of the estate of the deceased and would not relate to the administration of the estate. (**Orders #M-205, M-206, M-243, M-400, M-426**)
- The rights of a personal representative under this provision are narrower than the rights of the deceased person. The phrase 'relates to the administration of the individual's estate' should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate. The Commission held that this provision did not authorize a wife to obtain photographs held by the police related to the death of her husband even though the wife was, by her husband's will, the executrix of the estate. (**Order #M-384**)
- The personal representative of a deceased was unable to establish that the information held by the police concerning criminal investigations that had been undertaken against the deceased were related to the administration of individual's estate. This was so even though the estate and a production company had agreed to produce a documentary film based on the life of the deceased. The Commission found that the personal representative of the deceased did not need the records to wind up the estate as the records did not involve the gathering



in of assets and paying out of debts of the estate. (**Order #M-426**)

ss.(c)

- **Order #M-100** is an example of a case in which access to the personal information of two students, who were under the age of 16, was provided to the custodial parent by a school board. The disclosure in this context was approved of by the Commission.
- Where a divorce decree indicates that a parent does not have lawful custody of a child, this provision does not apply. As a result, the institution may consider disclosure in the balancing of factors under the exemption for personal information. (**Order #M-104**)
- This provision was not considered where a parent wanted access to his child's psychiatric records because the child was an adult at the time of the request and was therefore capable of consenting to the disclosure. (**Order #P-455**)
- In this case the custodial parent, a father, did not obtain access to records concerning his 14-year-old son under this provision. The records contained very sensitive information concerning records created as a result of a custody and child protection dispute between the parent and his former spouse. The Commission ruled that the parent cannot use this section to obtain records to meet his personal objectives and not those of his child. It was determined that disclosure of the sensitive information would not be in the best interests of the child. In this regard, the Commission found that the disclosures under this provision were required to be on behalf of the child and in the interests of the child and not for collateral interests. (**Order #P-673**)



## FIPPA

s.67

### CONFLICT WITH OTHER ACT/OTHER ACTS

## MFIPPA

s.53

(1) This Act prevails over a confidentiality provision in any other Act unless

subsection (2) or the other Act specifically provides otherwise.

the other Act or this Act specifically provides otherwise.

(2) The following confidentiality provisions prevail over this Act:

1. Subsection 53(1) of the Assessment Act.

- S.53(1) of the Assessment Act deals with records derived in the course of determining the value of real property and what assessment should be made.

2. Subsections 45(8), (9) and (10), 54(4) and (5), 74(5), 75(6), 76(11) and 116(6) and section 165 of the Child and Family Services Act.

- These provisions deal with child protection proceeding records, the child-abuse register, secure treatment program records and adoption records.

3. Subsection 77(6) of the Colleges Collective Bargaining Act.

- This section deals with records regarding membership in employee organizations.

4. Section 10 of the Commodity Futures Act.

- This section deals with records obtained in investigations under the Commodity Futures Act.

1. Section 105 of the Municipal Elections Act.

- This section deals with the contents of the ballot box in the custody of the Clerk.

2. Subsection 53(1) of the Assessment Act.



**6. Subsection 137(2) of the Courts of Justice Act.**

- This section deals with civil proceeding records which a court has ordered to be treated as confidential, sealed or not form part of the public record.

**7. Subsection 113(1) of the Labour Relations Act.**

- This section deals with union membership records.

**8. Subsection 32(4) of the Pay Equity Act.**

- This section deals with records about employees or groups of employees who wish anonymity in the course of proceedings under the Act.

**8.1 Subsection 28.38(2) of the Public Service Act.**

- This section deals with investigation files regarding whistleblowing protection.

**9. Section 14 of the Securities Act.**

- This section deals with confidentiality of records derived from investigations under the Securities Act.

**10. Subsection 4(2) of the Statistics Act.**

- This section deals with confidentiality provided for answers to questionnaires.

**11. Subsection 28(2) of the Vital Statistics Act.**

- This section deals with adoption records.



12. Section 40.1 of the  
Occupational Health and Safety  
Act.

- This section deals with trade secret information about hazardous materials used in the workplace.

[NOTE: Sections 32(3) and 34(3) of the Advocacy Act, S.O. 1992, c.26, state that the confidentiality clauses dealing with the advocates' case files of individual vulnerable persons prevail over FIPPA. This however is not noted in FIPPA.]







## ss.(1)

Orders #9, 15, 18, 21, 23, 25, 26, 32, 42, 51, 54, 62, 63, 83, 84, 88, 92, 96, 114 and 115 were decided under the former wording of s. 67(1) where confidentiality clauses operated as exemptions until January 1, 1990. They contain the section numbers referable to the pre-R.S.O. 1990 statutes.

- The Commissioner is obliged to determine whether the provision is a "confidentiality provision" and to examine the record to determine whether it falls within the terms of the provision. (**Orders #9, 18, 51, 54**)
- The confidentiality clause in s.25 of the Mortgage Brokers Act is ineffective given this provision. As a result, the disclosure of personal information to police officers for a law enforcement purpose is governed by s.42 [FIPPA] \ s.32 [MFIPPA]. (**R. v. Falloncrest Financial Corporation and others, Ontario Supreme Court, November 8, 1990, unreported**)

## ss.(2)

- This provision contains a list of the confidentiality provisions that override the Act. The fact that the records at issue in an appeal may be recognized as "privileged" in labour relations jurisprudence is not relevant where that privilege is not codified in one of the exemptions in the Act, or in this provision. (**Order #P-441**)
- A record that contains information that would reveal information that is subject to a confidentiality clause is also confidential. (**Order #P-353**)
- **Order P-325** contains an example of a record that is not disclosed based on the confidentiality clause in the Child and Family Services Act, which overrides FIPPA.
- The confidentiality override in s.32(4) of the Pay Equity Act applies where on the "Application for Review Services" form, the employee or employee group indicates that they do not wish their identity to be known to the employer. (**Order #P-653**)
- The confidentiality clause in s.53(1) of the Assessment Act was found to apply to actual rental information on properties used for comparative assessment purposes. The rents in this case was information provided to an assessor under s.53(1), relating to the value of the property and therefore to the assessment of the property--was not included in the assessment roll and was not disclosed to any other person who was entitled to that information. Moreover, the information was the actual rents for specified properties and it therefore related directly to actual income. (**Order #P-680**)



- Section 53(1) of the Assessment Act only applies to information furnished to, or acquired by, an assessor which relates to individual properties. The protection afforded by section 53(1) does not extend to the general rules by which different classes of property are assessed. **(Order #P-691)**
- To be covered by the confidentiality provision in s.53(1) of the Assessment Act, four requirements must be satisfied: (1) the information must not be required to be entered on the assessment roll, (2) the information must have been acquired by or furnished to an assessor in the course of his duties under s. 10 or 11 of the Assessment Act, (3) the information must relate in some way to the determination of the value of any real property or the amount of assessment thereof or to the determination of the amount of any business assessment, (4) the information is not being disclosed to any other person entitled in the course of that person's duties to acquire or have access to the information. Information that was acquired by an assessor from a Registry or Land Titles Office is not acquired under sections 10 or 11 of the Assessment Act and therefore does not fall under the confidentiality provision in s. 53(1) of the Assessment Act. **(Order #P-912)**
- S. 108 of the Police Services Act does not prevail over MFIPPA. **(Order #M-459)**
- The confidentiality clause in section 53(1) of the Assessment Act was found to apply to information related to the calculation of assessments that were obtained by the assessor by visiting the property. The information described the method by which the assessed values of the properties were calculated. **(Order #P-957)**
- A record falls under the confidentiality clause envisaged by s.53(1) of the Assessment Act where the release of that document would either (1) reveal the information actually obtained by or supplied to the assessor or (2) permit the drawing of accurate inferences about the information which was actually obtained or supplied in this fashion **(Order #P-931)**
- The Commission does not have the authority to use the disclosure provision of s.53(3) of the Assessment Act to override the application of the confidentiality clause of s.53(1) of the Assessment Act. Only an assessor has this discretion. **(Order #P-931)**



FIPPA

s.68

REVIEW OF THIS ACT

MFIPPA

s.55

The Standing Committee on the Legislative Assembly shall,

on or before the 1st day of	before the 1st day of January,
January, 1991,	1994,

undertake a comprehensive review of this Act and shall, within one year after beginning that review, make recommendations to the Legislative Assembly regarding amendments to this Act.







FIPPA

s.69

APPLICATION

MFIPPA

No comparable section

This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force.

[Compare MFIPPA s.52(1)]







**SUMMARY OF ORDERS/PRIVACY REPORTS**

- This provision recognizes that, although different requirements concerning the disclosure of records may have been imposed under earlier legislation, once the Act came into force these records are subject to the Act. (**Order #P-239**)







FIPPA

s.70

CROWN BOUND

MFIPPA

No comparable section

This Act binds the Crown.







FIPPA \ MFIPPA

AMALGAMATED REGULATIONS







## REGULATIONS

### FIPPA

#### O.Reg 459

### MFIPPA

No comparable regulation

- S.1 In this Regulation,  
"Archives" means the  
Archives of Ontario.
- S.2 An institution may dispose  
of personal information  
only by transferring it to  
the Archives or by  
destroying it.
- S.3 Where personal information  
is in the custody or under  
the control of an  
institution, no person  
shall destroy it without  
the authorization of the  
head.
- S.4 (1) Every head shall  
ensure that all reasonable  
steps are taken to protect  
the security and  
confidentiality of  
personal information that  
is to be destroyed,  
including protecting its  
security and  
confidentiality during its  
storage, transportation,  
handling and destruction.
- (2) Every head shall  
ensure that all reasonable  
steps are taken to protect  
the security and  
confidentiality of  
personal information that  
is to be transferred to  
the Archives, including  
protecting its security  
and confidentiality during  
its storage, trans-  
portation and handling.
- (3) In determining whether  
all reasonable steps are  
taken under subsection (1)



or (2), the head shall consider the nature of the personal information to be destroyed or transferred.

S.5 Every head shall take all reasonable steps to ensure that when personal information is to be destroyed, it is destroyed in such a way that it cannot be reconstructed or retrieved.

S.6 (1) Every head of an institution shall ensure that the institution maintains a disposal record setting out what personal information has been destroyed or transferred to the Archives and the date of that destruction or transfer.

(2) The head shall ensure that the disposal record maintained under subsection (1) does not contain personal information.



FIPPA  
O.Reg. 460

MFIPPA  
O.Reg.823

S.1 (1) The agencies, boards, commissions, corporations and other bodies listed in Column 1 of the Schedule are designated as institutions.

No comparable section

(2) The person occupying the position listed in Column 2 of the Schedule opposite to each institution listed in Column 1 is designated as the head of that institution.







## FIPPA

s.2

## MFIPPA

s.1

A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.







- "Unreasonable interference" must be decided on a case-by-case basis. It is clear that the section is intended to impose limits on the institution's responsibility to create a new record. (Order #50)







## FIPPA

### s.3

## MFIPPA

### s.2

(1) A head who provides access to an original record must ensure the security of the record.

(2) A head may require that a person who is granted access to an original record examine it at premises operated by the institution.

(3) A head shall verify the identity of a person seeking access to his or her own personal information before giving the person access to it.







## ss.(2)

- The head of an institution and other senior officials of an institution do not have a right under this provision to review personal information about requesters (including the requester's names) as part of a review of the amount of time spent by the institution in responding to access and requests. (**Privacy Investigation Report #I91-43M**)

## ss.(3)

- Where an individual purports to act as an agent under this section, the Commission must balance the right of the individual to be represented by an agent with the institution's obligation under s.3(3) of Regulation 460 [FIPPA] \ s.2(3) Regulation 823 [MFIPPA] to verify the identity of an individual seeking access to his or her personal information and whether or not the agent is properly authorized to obtain such information. If proper authorization cannot be obtained, the institution may either notify the individual whose personal information is at issue and provide him or her with an opportunity to provide representations prior to any decision regarding disclosure of the records or may deal with the validity of the authorizations as a preliminary matter. In determining whether the institution acted reasonably in refusing to accept certain authorizations, the following factors are relevant: whether the personal information is very sensitive, whether the authorizations preclude the institution from verifying the consent and whether or not the individuals who have allegedly consented have responded to the request for verification made by the institution. Special care would be taken where personal information is being requested about the treatment of vulnerable individuals. Institutions should not assume that requests for personal information by agents are invalid; rather, they should discuss the matter with the individuals involved before determining whether or not to accept the authorizations. (**Orders #P-533, M-71, P-455**)







## FIPPA

s.4

## MFIPPA

s.3

(1) Every head shall ensure that reasonable measures to prevent unauthorized access to the records in his or her institution are defined, documented and put in place, taking into account the nature of the records to be protected.

(2) Every head shall ensure that only those individuals who need a record for the performance of their duties shall have access to it.

(3) Every head shall ensure that reasonable measures to protect the records in his or her institution from inadvertent destruction or damage are defined, documented and put in place, taking into account the nature of the records to be protected.







## FIPPA

No comparable section

## MFIPPA

s.4

(1) An institution is not required to give notice of the collection of personal information to an individual to whom it relates if the head complies with subsection (2) and if,

- (a) providing notice would frustrate the purpose of the collection;
- (b) providing notice might result in an unjustifiable invasion of another individual's privacy; or
- (c) the collection is for the purpose of determining suitability or eligibility for an award or honour.

(2) For the purpose of subsection (1), the head shall make available for public inspection a statement describing the purpose of the collection of personal information and the reason that notice has not been given.







- In this case, the institution had hired a private investigator to investigate one of its employees who was allegedly working at another full-time job concurrent with employment with the institution. When the institution collected personal information about the employee, it did not give the requisite notice because the provision of notice would frustrate the purpose of the collection. The Commission agreed that this was the case, but noted that the institution may only rely on clause 4(1)(a) [MFIPPA] if it complied with s.4(2) [MFIPPA] of the same regulation. Subsection 4(2) [MFIPPA] requires that the public statement describing the purpose of the collection be made concurrently with the collection. Where this is not done, the notice provision is not complied with. (**Privacy Investigation Report #I92-55M**)

ss.(1)

- "Reasonable measures" to prevent unauthorized access to records may include implementing measures to protect the confidentiality of personal information transmitted through fax machines as recommended by the Commission in "Guidelines on Facsimile Transmission Security". (**Privacy Investigation Report #I94-067P**)







## FIPPA

### s.5

(1) Personal information that has been used by an institution shall be retained by the institution for at least one year after use

unless the individual to whom the information relates consents to its earlier disposal.

(2) For the purposes of subsection (1), the minimum period of retention of personal information that is contained in a telecommunication logger tape in the custody or under the control of the Ontario Provincial Police is 45 days rather than one year.

## MFIPPA

### s.5

Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom the information relates consents to its earlier disposal.







## FIPPA

s.6

## MFIPPA

s.6

The following are the fees that shall be charged for the purposes of subsection 57(1) (FIPPA)/45(1) (MFIPPA) of the Act:

1. For photocopies and computer printouts, 20 cents per page.
2. For floppy disks, \$10 for each disk.
3. For manually searching for a record after two hours have been spent searching, \$7.50 for each fifteen minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each fifteen minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each fifteen minutes spent by any person.
6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying the record if those costs are specified in an invoice received by the institution.







- The fees to be charged are those in force at the time of the request. Therefore where the request was made prior to January 1, 1991, when the fee schedule was amended, this new provision does not apply. (**Orders #P-260, P-264, P-265**)

**Para. 1**

- Twenty cents per page is the maximum amount that may be charged for photocopying and this includes the cost of feeding the machine. As a result, the institution may not charge for the time to photocopy the records within the calculation of preparation time. (**Orders #184, 185, M-163, M-218**)
- It is permissible for an institution to charge a fee for the time spent severing a record, as preparation, and then 20 cents per page for photocopying costs. (**Order #P-260**)

**Para. 3**

- Examining ledger-sized binders of computer sheets to determine whether particular sheets are responsive to a request should be calculated as search time rather than preparation time because it involves locating and identifying information responsive to a request. (**Order #M-546**)

**Para. 4**

- An institution may charge for the time it takes to sever records for disclosure. In this case, the Commission approved the fee of 50 cents per page based on the estimate of 1 minute per page for severing. (**Order #M-163**)
- Time spent disassembling binders for photocopying purposes may be included in preparation time charges. However, an institution is not allowed to charge for "interruption time" - that is, for time that individuals who are processing the request will require to attend to other matters. An institution may only charge for time spent actually processing a request. (**Order #M-546**)

**Para. 5**

- In this case, the institution estimated the fee to develop a special computer program in order to produce the record in the form requested. The institution calculated its computer costs in the same manner as if a manual search would have taken place. This calculation benefited the requester because manual searches are chargeable at a lower rate. The time for computerized search includes the time required to modify the data base in order to produce severed copies of the records on computer. In the result, the fee estimate was approved by



the Commission. (**Order #M-163**)

- In this case the institution had the capability of producing photographs in-house and therefore could not pass the costs of the production of the photograph on to the requester by invoice. The Commission ruled that the only costs of the that could be passed on were those involved in preparing the record for disclosure. The Commission found that because there is no specific rate in the Regulation for the reproduction of photographs, did not preclude the institution from charging a fee for this service. (**Order #M-236**)

**Para.6**

- The institution may not estimate the costs that may be payable by invoice; the invoice must be obtained in order to bill for this. (**Order #P-741**)



## FIPPA

s.7

## MFIPPA

s.7

(1) If a head gives a person an estimate of an amount payable under the Act and that estimate is \$25 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before completing the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.







## SUMMARY OF ORDERS/PRIVACY REPORTS

- Fee estimates for complex requests should be accompanied by an "interim" notice that indicates the likelihood of obtaining access. The fee estimate must be based on a reasonable understanding of the costs involved in providing access. (**Order #81**)







## FIPPA

s.8

## MFIPPA

s.8

The following are prescribed as matter for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.
2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.







- The purpose of fees is to recover some of the costs of administration and to ensure that those using the Act assume their fair share of costs. (**Orders #2, 6, 7, 8, 31, 81**)
- As a general rule, where an institution receives a request for a fee waiver of a small payment, it must carefully weigh the administrative expense incurred in refusing such a request against the value of collecting the payment. (**Order # M-561**)







## FIPPA

s.9

## MFIPPA

s.9

If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.







FIPPA  
s.10

MFIPPA  
s.10

(1) The following are the terms and conditions relating to security and confidentiality that a person is required to agree to before a head may disclose personal information to that person for a research purpose:

1. The person shall use the information only for a research purpose set out in the agreement or for which the person has written authorization from the institution.
2. The person shall name in the agreement any other persons who will be given access to personal information in a form in which the individual to whom it relates can be identified.
3. Before disclosing personal information to other persons under paragraph 2, the person shall enter into an agreement with those persons to ensure that they will not disclose it to any other person.
4. The person shall keep the information in a physically secure location to which access is given only to the person and to the persons given access under paragraph 2.
5. The person shall destroy all individual identifiers in the information by the date specified in the agreement.
6. The person shall not contact any individual to whom personal information relates, directly or indirectly, without the prior written authority of institution.
7. The person shall ensure that no personal information will be used or disclosed in a form in which the individual to whom it relates can be identified without the written authority of the institution.
8. The person shall notify the institution in writing immediately if the person becomes aware that any of the conditions set out in this section have been breached.

(2) An agreement relating to the security and confidentiality of personal information to be disclosed for a research purpose shall be in Form 1.







## RESEARCH AGREEMENT

This agreement is made between \_\_\_\_\_, referred to below as the researcher, and  
name of researcher

\_\_\_\_\_, referred to below as the institution.  
name of institution

The researcher has requested access to the following records that contain personal information and are in the custody or under the control of the institution: (Describe the records below)

The researcher understands and promises to abide by the following terms and conditions:

1. The researcher will not use the information in the records for any purpose other than the following research purpose unless the research has the institution's written authorization to do so: (Describe the research purpose below).

2. The researcher will give access to personal information in a form in which the individual to whom it relates can be identified only to the following persons: (Name the personal below)

3. Before disclosing personal information to persons mentioned above, the researcher will enter into an agreement with those persons to ensure that they will not disclose it to any other person.

4. The researcher will keep the information in a physically secure location to which access is given only to the researcher and to the persons mentioned above.

5. The researcher will destroy all individual identifiers in the information by \_\_\_\_\_.  
(date)

6. The researcher will not contact any individual to whom personal information relates, directly or indirectly without the prior written authority of the institution.

7. The researcher will ensure that no personal information will be used or disclosed in a form in which the individual to whom it relates can be identified without the written authority of the institution.

8. The research will notify the institution in writing immediately upon becoming aware that any of the conditions set out in this agreement have been breached.

Signed at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 199\_\_\_\_.

Researcher

Name: \_\_\_\_\_

Address:

Telephone: \_\_\_\_\_

Representative of Institution

Name : \_\_\_\_\_

Position:

Institution: \_\_\_\_\_

Address: \_\_\_\_\_







## FIPPA

### s.11

## MFIPPA

### s.11

A request for access to a record under Part II(FIPPA)/Part I (MFIPPA) of the Act or for access to or correction of personal information under Part III (FIPPA)/Part II (MFIPPA) of the Act shall be in Form 2 or in any other written form that specifies that it is a request made under the Act.







**FORM 2**  
**REQUEST FORM**

Request for \_\_\_\_\_ Name of Institution request made to: \_\_\_\_\_  
☐ Access to General Records  
☐ Access to Own Personal Information  
☐ Correction of Own Personal Information

If requests is for access to, or correction of, own personal information records

Last name appearing on records ☐ same as below or ▶

Detail

Last Name \_\_\_\_\_ First Name \_\_\_\_\_ Middle Name \_\_\_\_\_ ☐ Mr. ☐ Mrs.  
☐ Ms. ☐ Miss

Address (Street/Apt. No./P.O. Box/R.R. No.) \_\_\_\_\_ City/Town \_\_\_\_\_ Province \_\_\_\_\_

Postal Code \_\_\_\_\_ Telephone Number \_\_\_\_\_

Day ▶ ( ) Evening ▶ ( )

Detailed description of requested records, personal information or personal information to be corrected. (If you are requesting access to or correction of your personal information, please identify the personal information bank or record containing the personal information, if known)

Note: If you are requesting a correction of personal information, please indicate the desired correction and, if appropriate, attach any supporting documentation. You will be notified if the correction is not made and you may require that a statement or disagreement be attached to your personal information.

Preferred method of access to records \_\_\_\_\_ Signature \_\_\_\_\_ Date \_\_\_\_\_

☐ Examine Original  
☐ Receive Copy

For Institution Use Only

Date Received \_\_\_\_\_ Request Number \_\_\_\_\_ Comments \_\_\_\_\_

Personal information contained on this form is collected pursuant to the Freedom of Information and Protection of Privacy Act \ Municipal Freedom of Information and Protection of Privacy Act and will be used for the purpose of responding to your request. Questions about this collection should be directed to the Freedom of Information and







## **JUDICIAL REVIEW DECISIONS**



## JUDICIAL REVIEW DECISIONS

### The Standard of Review

- In the absence of a privative clause, deference will only apply to decisions of tribunals that exercise specialized expertise. The specialized role and expertise of the Information and Privacy Commissioner is reflected in the powers and duties assigned to the Commissioner under the legislation. Under clause 58(2)(c) [FIPPA] (no comparable MFIPPA section), the Commission is required to make recommendations to the legislature regarding practices of government institutions and proposed amendments to the Act; under section 59 [FIPPA]/section 46 [MFIPPA], the Commission is entitled to offer comment on the privacy protection implications of proposed legislative schemes or government programs, to order an institution to cease a collection practice and to destroy collections of information that contravene the Act, and to engage in or commission research into matters affecting the carrying out of the purposes of the Act. The Commissioner has accumulated a great deal of experience and expertise in interpreting and applying the legislation. For example, the Commissioner has significant experience and expertise in balancing three competing interests: public access to information, individual's right to protection of privacy in respect of personal information held by institutions and the institution's interest in confidentiality of government records. The Commissioner has received over 2,300 appeals under the legislation in the past three years. As well, the Commissioner has issued over 530 orders to date that act as precedents to guide it in the development of the law in this area. As a result, the proper test on judicial review is for the court to defer to the decisions of the Commission, which are made within its area of expertise. The Commission should therefore be given no deference in constitutional matters, but should be given deference in respect of the application of the exemptions under the legislation. (**Re Solicitor General of Ontario et al. and the Assistant Information and Privacy Commissioner et al.**, (1993), 102 D.L.R. (4th) 602 (Ont.Div.Ct.) While this decision was appealed and overturned by the Court of Appeal, in **Ian Wilson, the Archivist of Ontario and the Assistant Information and Privacy Commissioner et al.**, October 29, 1993, the Court did not deal with the standard of review. The Divisional Court's view was affirmed in **Ontario Human Rights Commission v. Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner et al.**, March 25, 1994, Court File No. 721/92, Justices Boland, Trainor and White and in **The Attorney General of Ontario v. Anita Fineberg, Inquiry Officer and John Doe**, June 30, 1994, Ontario Divisional Court, File No. 621/93, Justices Hartt, Then and Adams.)
- Deference to the decisions of specialized administrative tribunals does not depend entirely on the existence of a privative clause by which the legislature has expressly directed the court to apply a non-discretionary form of deference. Even where the legislature has provided a right of appeal to the courts, curial deference should be given to the opinion of an administrative tribunal, which enjoys the requisite quality of specialized expertise on issues that fall squarely within its area of expertise. In such cases, the court should not



interfere unless the tribunal's decision is not reasonable or is clearly wrong. The Information and Privacy Commissioner, unlike the ad hoc tribunal established by the Canadian Human Rights Act to decide a single dispute, is appointed as an officer of the Legislature by the Lieutenant Governor in Council on the address of the Assembly for a five-year term, and is prohibited from holding any other offices during that term. The Commissioner has staff, including the Assistant Commissioners, mediators and other officers who assist the Commissioner in performing his functions and duties under the Act. Although the Commissioner deals to some extent with basic social values, they are not as basic as the values at stake in human rights legislation where the statutory questions are often the same Charter questions in which courts have developed expertise and need not defer to other tribunals. Under the Act, the adjudicative function is performed by the same person who administers the specialized area of regulatory activity. Such adjudicative function is integral to the supervision of its specialized area of regulatory activity. The powers of the Commissioner are significant and the inquiry process is specialized and unique. It may be conducted in private. The Commissioner is given inquisitorial or investigatory powers, as well as the power to examine under oath. The Court stated that:

"These unusual powers and procedure may attract judicial scrutiny on natural justice grounds; however, the uniqueness of this adjudicative process indicates that the Legislature intended to confer upon the Commissioner a distinctive and unusual mixture of adjudicative and administrative functions, unlike the functions performed by bodies such as the Canadian Human Rights Appeal tribunals."

The Court went on to say that:

"To the extent that information has become a commodity, the management of information by the Commissioner is similar to the management of other commodities by other specialized tribunals, which have attracted curial deference by reason of the specialized nature of their work."

In the result, the Court concluded that the Commissioner's decisions ought to be "accorded a strong measure of curial deference even where the legislature has not insulated the tribunal by means of a privative clause." (**Re John Doe et al. and Information and Privacy Commissioner et al. (1993), 13 O.R. (3d) 767 (Div. Ct.)**, applied in **The Minister of Government Services v. Assistant Information and Privacy Commissioner Tom Mitchenson, and Michael Teevens, as yet unreported, February 11, 1994, Ontario Divisional Court, File No. 481\92**)

- Where the Commissioner acts in good faith and his or her decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court, on judicial review, will not intervene. (**Right to Life Association of Toronto and Area v. Metropolitan Toronto District Health Council and others (1991), 86 D.L.R. (4th) 441. See also Rubin v. Information and Privacy Commissioner, January 27, 1992, Ontario Divisional Court, unreported**)
- Where the Commissioner reaches a reasonable decision in the particular circumstances of the case, the Court, on judicial review, will not intervene, even though it may not necessarily



agree with the analysis by the Commissioner. (Attorney General for Ontario et al. and John Higgins, Inquiry Officer et al., Ontario Divisional Court, June 19, 1995, Court File Nos. 1/95 and 2/95, Justices McMurtry, Saunders and Winkler.)

- While the Divisional Court affirmed that a substantial measure of curial deference is to be accorded to decisions of the Information and Privacy Commission, it nevertheless found that the decision, which involved the interpretation of the Act regarding personal information and the exemption for economic interests, was patently unreasonable and overturned it. (**The Queen in Right of Ontario as represented by the Ministry of Health v. Anita Fineberg et al., June 24, 1994, Ontario Court of Justice (Divisional Court)**)
- In this case, Order #210 (and all other reiterating orders) was overturned by the Ontario Divisional Court. The Court held that the Inquiry Officer had interpreted the solicitor-client privilege exemption too narrowly in finding that records had to represent communications of a confidential nature between a client and a legal advisor which are directly related to seeking, formulating or giving legal advice. The Ontario Divisional Court held that a document is entitled to exemption as long as its dominant purpose is the giving legal advice, even if it also has another purpose (e.g., operational purpose). (**The Attorney General of Ontario and Donald Hale, Ernst and Young and John Doe, April 11, 1995, Ontario Divisional Court, Court File No. 462/94, Justices Saunders, Rosenberg and Feldman**).
- Where the Commissioner applied the wrong test and came to a patently unreasonable answer, the decision was quashed by the Divisional Court. (**Re Workers' Compensation Board and Mitchinson, Assistant Information and Privacy Commissioner, (1995), 23 O.R. (3d) 31 (Div. Ct.)**)

#### Access to Records in the Judicial Review

- In this case, the Ontario Court of Appeal ruled that the appeal of the judicial review decision of the Divisional Court should be heard in open court. Despite this, the records were sealed and the court proceeded to hear the matter without direct reference to the contents of the records themselves. The court stated that it did have the right to allow counsel to make submissions in camera where reference to the contents of the record was necessary. (**Ian Wilson, the Archivist of Ontario and the Assistant Information and Privacy Commissioner et al., October 29, 1993, Ontario Court of Appeal. In this respect, this decision affirmed the lower court decision in Re Solicitor General of Ontario, et al. and the Assistant Information and Privacy Commissioner et al., (1993), 102 D.L.R. (4th) 602 (Ont.Div.Ct.)**)
- Except in the most exceptional circumstances, proceedings before courts must be open to the public. In considering the nature of the judicial review, where access to records is at issue, the court sealed the records and required counsel to refer to the sealed records by page and paragraph number during submissions. This enabled the court to read the evidence to itself in open court during the hearing, and also protected the confidentiality of the records pending the decision of the court. (**Re Solicitor General of Ontario, et al. and the**



- The general presumption is that judicial proceedings must be open to the public. In this case the court stated that, wherever possible, reference to the sealed portion of the record be avoided in argument before the court as well as in the reasons of the court. (**Re John Doe et al. and Information and Privacy Commissioner et al. (1993), 13 O.R. (3d) 767 (Div. Ct.)**)
- The solicitors for the applicant\requester in the judicial review did not obtain access to portions of the sealed records because they also acted for the same client in the main action against the institution (wrongful dismissal). The Court, on a motion, ruled that the circumstances would therefore render compliance with an undertaking not to disclose the contents of the material to the client impossible. The solicitors could not disabuse their minds of any significant information during the subsequent proceedings. As a result, the Court ordered that disclosure of the sealed records may be provided to independent counsel retained by the solicitors who must provide the undertaking not to disclose to their client. Such counsel or another independent counsel, must thereafter represent the solicitors on the judicial review application. The Court stated that "a balance must be struck between the need to preserve the integrity of the privacy legislation and the interests of the client." (**Corporation of the Town of Gravenhurst v. Information and Privacy Commissioner\Ontario et al. (1993), 13 O.R.(3d) 531, at 533 (Div.Ct.)**)
- During a judicial review application the court ordered the hearing to be held in camera in the presence of counsel only. The Court also ruled that the records in issue be sealed and not form part of the public record. On the written undertaking of counsel for the applicant and intervenor, that the records in issue would not be disclosed to their clients or anyone else, the records were provided to counsel to enable them to prepare for the hearing. Counsel also undertook to return the documents to the Commission or to dispose of them in accordance with the court's ruling at the close of the hearing. (**N.E.I. Canada Ltd. v. Information and Privacy Commissioner (Ont.) (1990), 40 O.A.C. 77 (Div. Ct.)**)

### **Standing**

- Because of the doctrine of indivisibility of the Crown, the Crown must speak with one voice. As a result, where the Crown undertakes a judicial review, the institution that made the decision that is under judicial review should be the party that acts as the applicant. If an issue arises between ministries, that is for Cabinet, not the courts, to resolve. In this particular case, the matter of standing did not have to be decided because the parties agreed to effect this on consent. (**Re Solicitor General of Ontario et al. and the Assistant Information and Privacy Commissioner et al., (1993), 102 D.L.R. (4th) 602 (Ont.Div.Ct.)**)

### **Admissibility of Evidence in the Judicial Review**

- Where a judicial review application concerns the relevance of the public interest in



s.21(2)(a) [FIPPA]\s.14(2)(a) [MFIPPA] and s.23 [FIPPA]\s.16 [MFIPPA], newspaper articles are admissible to show that there is no evidence of public concern. This decision is in keeping with the decision of the Ontario Court of Appeal, in Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd. (1980), 29 O.R. (2d) 513, which held that new evidence can only be adduced on judicial review to demonstrate an absence of evidence on a particular point or where there is a denial of natural justice. (**Re John Doe et al. and Information and Privacy Commissioner et al.** (1993), 13 O.R. (3d) 767 (Div. Ct.) at 9)

## Costs

- In this case, the Ontario Court of Appeal did not order costs when it overturned the decision of the Divisional Court and of the Information and Privacy Commission. The case concerned the disclosure of records in advance of a criminal trial where, in the court's view, the disclosure could reasonably be expected to interfere with the accused's ability to obtain a fair trial. (**Ian Wilson, the Archivist of Ontario and the Assistant Information and Privacy Commissioner, October 29, 1993, Ontario Court of Appeal**)
- Where the Divisional Court ruled that the Information and Privacy Commission had interpreted the privacy provisions of the legislation in an unreasonable fashion and as a result overturned its decision, the Court ordered the Commission to pay costs of the hearing to the applicants in the amount of \$5,000. (**Re John Doe et al. and Information and Privacy Commissioner et al.** (1993), 13 O.R. (3d) 767 (Div. Ct.) at 32.)
- The applicant Township was ordered to pay \$1500. in costs to the respondent and \$2500. in costs to the respondent Information and Privacy Commissioner when the application for judicial review was dismissed. (**The Corporation of the Township of Maidstone v. Kathleen Starzacher and the Information and Privacy Commissioner\Ontario, January 10, 1994, Ontario Divisional Court, Justices White, Dunnet and Jenkins**)
- In this case the Ontario Divisional Court did not order costs against the Crown, even though the Crown was the applicant and in the result the application was dismissed. The Crown brought the action on behalf of the affected parties on the basis that disclosure of their personal information would have been an unjustified invasion of their privacy. (**The Minister of Government Services v. Assistant Information and Privacy Commissioner Tom Mitchinson, and Michael Teevens, as yet unreported, Feb.11, 1994, Ontario Divisional Court, Court File No.481/92**)
- The Ontario Divisional Court found that the Commissioner reached a reasonable decision in the particular circumstances of the case and dismissed the application. Costs were awarded to the requester in the amount of \$2000. (**Attorney General for Ontario et al. and John Higgins, Inquiry Officer et al., Ontario Divisional Court, June 19, 1995, Court File Nos. 1/95 and 2/95, Justices McMurtry, Saunders and Winkler.**)



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